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MANUAL

OF THE

MERCANTILE LAW

OF

Great Britain and Ireland:

COMPRISING

INTERNATIONAL COMMERCE.
RESTRAINTS ON TRADE:
PATENTS.
COPYRIGHT.
JOINT-STOCK AND BANKING COMPANIES.
THE LAW OF PARTNERSHIPS.
BILLS OF EXCHANGE.

WITH

REMARKS ON PARTNERSHIP WITH LIMITED LIABILITY.

BY LEONE LEVI,

LECTURER ON COMMERCIAL LAW AT KING'S COLLEGE, LONDON;

AUTHOR OF "COMMERCIAL LAW OF THE WORLD," ETC. ETC.
HON. MEMBER OF THE LIVERPOOL AND LEEDS CHAMBERS OF COMMERCE; FELLOW OF THE STATISTICAL SOCIETY OF LONDON; ASSOCIATE OF THE INSTITUTE OF ACTUARIES; MEMBER OF THE LAW AMENDMENT SOCIETY; AND OF THE SOCIETY OF ARTS, MANUFACTURES, AND COMMERCE, ETC.

"Les lois du commerce perfectionnent les mœurs, par la même raison que ces mêmes lois perdent les mœurs."—*Esprit des Loix.*

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RJF 22 May 53

TO THE

RIGHT HONOURABLE SIR JAMES PARKE,

KNIGHT, ETC. ETC.

ONE OF THE BARONS OF HER MAJESTY'S COURT
OF EXCHEQUER.

My Lord,

The privilege of dedicating this Work to your Lordship is an honour which I value beyond measure; but when I consider the high position which your Lordship so eminently fills, I feel some diffidence in submitting to your matured judgment these my humble labours.

It is superfluous for me to bear testimony to the learning and rectitude of those who preside over our Courts of Justice. Whatever defect may exist in the Laws of England, Ireland, or Scotland, that defect is far outweighed by the spirit of integrity with which justice is administered throughout the United Kingdom—

OCEANA, 4-25-53

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the purity and independence of our Tribunals have found an echo in every clime, and their justice and impartiality have become proverbial throughout the world.

That your Lordship may long be spared to enlighten by your intelligence, and benefit by your experience, the whole system of Jurisprudence, and that British Tribunals may ever preserve their high character for enunciating the dictates of right reason, and establishing the precepts of sound morality, is the fervent prayer of,

My Lord,
Your Lordship's
Most obedient and humble Servant,

LEONE LEVI.

12, The College,
Doctors' Commons, London,
November 1854.

PREFACE.

It has been suggested to me to prepare a Manual of Mercantile Law, less compendious than my former work. In undertaking such a labour, and with a view to simplify a subject of so much importance, my aim has been to be explicit and practical. I have endeavoured to avoid technicalities, and, with as much brevity as was compatible with clearness, I have expounded the substance of Mercantile Law, relating to the subjects passed under review, as it is now in force in England, Ireland, and Scotland.

The discrepancies existing between the Mercantile Laws of different parts of the United Kingdom will, it is hoped, be speedily remedied, a Royal Commission having been issued for that purpose. I trust that the

labours of the eminent Commissioners will also be directed to the British Colonies; the Mercantile Laws of which are in an anomalous and ambiguous state.

I have deemed it essential to illustrate the subject by allusions to the laws of foreign countries; inasmuch as the commercial relations of this great empire extend over every portion of the globe, and thus British capital is embarked in undertakings of a most varied character in all countries. In truth, we appear to be daily approaching that state of community amongst nations, by which God has designed to unite all the families of the earth.

British and American jurisprudence still stand in want of Codification. The great principles of our law are yet buried in thousands of volumes, and much dross must be removed in order to extract the smallest particle of ore. This is to be lamented. It may be admitted that the Codification of the law can never limit the multifarious exigencies which constantly give rise to new principles, or to modifications and expansions of those already settled. But there are certain principles which, proceeding from natural law and being founded on pure ethics, are fixed and immutable.

These are daily applied in the solution of intricate mercantile questions in our Courts of Justice, and by none with more acuteness and cogency than by the eminent Judge to whom this Work is dedicated. Codification would render these great principles familiar to commercial men, whilst a more extended knowledge of them would tend to introduce greater certainty in mercantile transactions.

Treatises and Manuals may, to a certain extent, supply the want of a Code. What better summary of the Law of Shipping can we possess, than the learned work of Lord Tenterden? or what exposition of the Law of Contracts can be more complete, than the treatises of Chitty and Addison? The learned and comprehensive work, known as Smith on Mercantile Law, is in itself a valuable substitute for a Code; and, without naming many other writers on the different branches of Commercial Law, it may be truly stated that both English and American jurists have done all that labour and ingenuity could effect, towards reducing into a system the vast amount of juridical learning.

The simplification of the Law will also contribute to its becoming more attractive as a branch of liberal

education. Time was, when Law formed part of the general education of a Gentleman; and it is rational that Commercial Law should form one of the most essential elements of the education of the Merchant. It is a matter of gratification that the Council of King's College, one of the principal Educational Institutions of the metropolis of the commercial world, have added this to the many branches of science there taught. It may be hoped that such an auspicious commencement may be instrumental in establishing Professorships of Commerce and Commercial Law in all our Seats of Learning.

Although this Work is intended to be a Manual, and a Class-book, of the Law as it now stands, suggestions for the amendment of some portions of our Mercantile Jurisprudence are submitted, in the form of notes. It is not without great deference that any individual should venture to suggest changes in any of our time-honoured Institutions; yet it is only by constant pruning, and by the introduction of fertilizing elements, that we may be enabled to maintain the growth of our legislation in a healthy and vigorous state. From the many idioms with which the English language abounds, and from the many forensic technicalities to be met with in

legal research, it would have been a task of some difficulty to have expressed myself in terms sufficiently accurate, had I not freely availed myself of text-books, and of the lucid language of our Judges. Much I owe to those master-pieces of legal composition, the Works of Mr. Justice Story; they are, indeed, enriched with jewels of classical learning, but their inherent worth becomes even more brilliant from the elegance of style and purity of diction in which they are inlaid.

The present volume contains the Laws which affect International Commerce, Individuals who exercise the Mercantile Profession, Partnerships and Companies formed for Commercial or Banking operations, and the most useful of all Mercantile Instruments, Bills of Exchange and Promissory Notes. A future volume will be devoted to the relation of Agency, Shipping, Insurance, and other branches of Commercial Law.

Acknowledgments of gratitude are due from me to many eminent individuals who have kindly afforded me their valued countenance, amongst whom I would especially name that distinguished nobleman, the Earl of Harrowby. The Swiney Prize, for the best published Treatise on Jurisprudence, awarded to me after a

competition opened to Authors of *every Nation;* together with the honourable marks of distinction bestowed on me by the Sovereigns of Austria and Prussia, have operated as powerful incentives towards the prosecution of my labours. These latter tokens of approbation encourage me to renewed energy in the promotion of whatever may tend to remove the barriers which still obstruct the expansion of trade, and to cement the universal relations of amity and commerce.

LEONE LEVI.

TABLE OF CONTENTS.

PAGE

DEDICATION - - - - - - iii

PREFACE - - - - - - v

TABLE OF CONTENTS - - - - - xi

LIST OF AUTHORITIES - - - - - xvi

TABLE OF CASES - - - - - xvii

ABBREVIATIONS OF AUTHORITIES AND REPORTS - - xxiii

BOOK I.

ON COMMERCE.

CHAPTER I.

PROGRESS OF COMMERCE - - - - - 1

CHAPTER II.

INTERNATIONAL COMMERCIAL LAW - - - 18

CHAPTER III.

NATURE, SPIRIT, AND HISTORY OF COMMERCIAL LAW - - 23

BOOK II.

RESTRAINTS OF TRADE.

CHAPTER I.

OF MERCHANTS.

		PAGE
SECT. 1.	Definition of Merchant	34
2.	Obligations not to Trade	35
3.	Rank and Profession incompatible with Trading	36
4.	National Character of the Merchant	37
5.	Forms and Effects of Foreign Contracts	39
6.	Aliens	42
7.	Minors	44
8.	Married Females—Idiots—Drunkards	47

CHAPTER II.

RESTRAINTS ON TRADE BY REGULATIONS AND PRIVILEGES - 49

CHAPTER III.

LAW OF PATENT.

SECT. 1.	Nature and Policy of Patent Law	52
2.	Subject-matter of a Patent	54
3.	Priority of Invention	56
4.	Proceeding to obtain a Patent	57
5.	Title and Specification of a Patent	59
6.	Notice of Alteration in a Patent	60
7.	Property in Patents and Assignment	61
8.	Remedies against Infringement	62

CHAPTER IV.

LAW OF COPYRIGHT.

PAGE

SECT. 1. Nature and History of Copyright - - 64
2. Delivery of Copies to Public Libraries - - 67
3. Registry of Stationers' Hall, and Assignment - 68
4. Foreign Copyright - - - - 70
5. Copyright in Works of Art and Manufacture - 71
6. Infringement of Copyright - - - 73
7. International Copyright - - - 76

CHAPTER V.

RESTRAINTS ON TRADE IN TIME OF WAR—INTERNATIONAL LAW.

SECT. 1. Nature of International Law - - - 81
2. Rights of Belligerents - - - 83
3. Licences - - - - - - 87
4. Right of Search - - - - 88
5. Right of Capture - - - - - 90
6. Right of Blockade - - - - 96
7. Rights and Duties of Neutrals - - - 98

BOOK III.

ON MERCANTILE CONTRACTS.

CHAPTER I.

OF CONTRACTS.

SECT. 1. Nature of Contract - - - - 101
2. The Consent. - - - - - 101
3. Capacity of the Parties, Subject-matter, and Consideration - - - - - 104
4. Form of the Contract - - - - 105
5. Limitation of Action - - - 107

CHAPTER II.

OF PARTNERSHIP.

PAGE

SECT. 1. Constitution of Partnership - - - 109
2. Who may be a Partner - - - 116
3. Kinds of Partnership - - - - 118
4. Formation of the Contract - - - 122
5. Common Firm and Status of the Partnership - 128
6. Partnership Property - - - - 130
7. Interest of the Partners in the Property and the Profits - - - - - - 131
8. Duties of Partners - - - - 133
9. Extent of Liability of Partners - - - 134
10. Rights and Authorities of Partners - - 139
11. Remedies between Partners - - - 144
12. Remedies against Third Persons - - 150
13. Liability of Retiring Partners - - - 153
14. Dissolution of Partnership - - - 155
15. Effects of Dissolution as among the Partners - 163
16. Effects of Dissolution with respect to Creditors 165

CHAPTER III.

OF CHARTERED AND TRADING COMPANIES.

SECT. 1. Nature and Origin of Joint-Stock Companies - 168
2. Companies by Letters Patent or Charter - 169
3. Progress of Joint-Stock Companies - - 172
4. Joint-Stock Companies Act - - - 176
(A.) Registration of Joint-Stock Companies - 176
(B.) Provisional Registration - - - 177
(C.) Liability of Promoters of Companies Provisionally Registered - - - 178
(D.) Complete Registration - - - 181
(E.) Accounts - - - - - 182
(F.) Rights of Shareholders - - - 183
(G.) Contracts - - - - - 184
(H.) Liability of Shareholders - - 185

PAGE

Sect. 5. Companies for Public Works - - - 186
6. Mining Companies, and Companies upon the Cost-Book System - - - - 189
7. Insurance Companies - - - - 193
8. Winding up of Joint-Stock Companies - - 195

CHAPTER IV.

OF BANKS AND BANKING COMPANIES.

Sect. 1. History of Banking - - - - 199
2. The Bank of England - - - - 200
3. The Banks of Scotland, Ireland, and France - 205
4. Banking Companies - - - - 206
5. Joint-Stock Banking Companies - - 209
6. Relations of Bankers and their Customers - - 212

REMARKS ON PARTNERSHIP WITH LIMITED LIABILITY - 215

CHAPTER V.

ON BILLS OF EXCHANGE.

Sect. 1. Nature and Form of Bills and Notes - - 232
2. Stamp Duties on Bills and Notes - - 238
3. Parties to a Bill or Note - - - - 242
4. Endorsement - - - - 243
5. Presentment for Acceptance - - - 246
6. Acceptance - - - - - 247
7. Presentation for Payment - - - - 249
8. Protest - - - - - 253
9. Notice of Dishonour - - - - 254
10. Payment - - - - - 256
11. Bank Cheques - - - - - 259

Postscript - - - - - - 263

Index - - - - - - - 267

LIST OF AUTHORITIES

REFERRED TO IN THIS VOLUME.

Acts of Congress of the United States of America.
Addison on Contracts.
Bacon's Observations on a Libel.
Bailey on Bills of Exchange.
Bell's Principles of the Law of Scotland.
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Child's Letters to R. B. Crowder.
Chitty's Practical Statutes.
Code, Civil, French.
———— Austrian.
———— Dutch.
Code of Commerce, French.
———————— Spanish.
———————— Portuguese.
———————— Austrian.
Consolato del Mare.
Corpus Juris Civilis.
Dalloz, Jurisprudence.
Domat, Civil Law.
Duer, on Insurance.
Fraser, on Personal and Domestic Relations.
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Phillimore, Dr. R., on Domicile.
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Puffendorfius, De Jure Naturæ et Gentium.
Queries of the Mercantile Law Commissioners.
Reddie on Maritime Law.
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Report of the Juries of the Great Exhibition, 1851.
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Russian Swod.
Shaw's Digest of the Law of Scotland.
Smith's Mercantile Law.
Spence's Equity Jurisprudence.
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Starkie, on Evidence.
Story, on Partnership.
——— on Equity Jurisprudence.
——— on Conflict of Law.
———'s Miscellaneous Writings.
Taylor, on Joint-Stock Companies.
Vattel, Droit des Gens.
Wheaton's International Law.
Williams on Personal Property.
———— on Real Property.

TABLE OF CASES

FROM THE

ENGLISH, SCOTCH, IRISH, AMERICAN, AND FRENCH REPORTS.

A.

Abel *v.* Sutton, 154, 163.
Adam *v.* Lindsell, 102.
Adams *v.* Bingley, 154.
Adelaide, the, 97.
Alexander *v.* Barker, 151.
——— *v.* Thomas, 235.
Allen *v.* Rawson, 55.
Alves *v.* Hodgson, 40.
Anderson *v.* Tomkins, 131.
——— *v.* Weston, 235.
Ann Green, the, 85.
Appleton *v.* Binks, 142.
Archer *v.* Bank of England, 244.
Arden *v.* Sharpe, 140.
Aspinal *v.* L. & N. W. R. Co., 161.
Ault *v.* Goodrich, 153.

B.

Bagster *v.* Earl of Portsmouth, 48.
Bailey *v.* Porter, 255.
Baker *v.* Charlton, 117, 120.
Baring *v.* Dix, 160.
Barker *v.* Hudson, 86.
Barough *v.* White, 259.
Barton *v.* Williams, 139.
Barry *v.* Nesham, 111, 115.
Battley *v.* Bailey, 126.
Beard *v.* Webb, 117.
—— *v.* Egerton, 56.
Beckford *v.* Wade, 150.
Becquet *v.* M'Carthy, 41.
Bedford *v.* Dakin, 154.
Bellamy *v.* Majoribanks, 261.
Belton *v.* Hodges, 44.
Bennett *v.* Goude, 152.
Bensley *v.* Bignold, 110.
Berry's Patent, *in re*, 59.
Betsey, the, 97, 98.
Bignold *v.* Waterhouse, 142
Bishop *v.* the Countess of Jersey, 141.
Blackenhagen *v.* Blundell, 417.
Blackett *v.* Roy. Exch. Assur. Comp., 25.
Blackney *v.* Dufaur, 149.
Blake *v.* Nutter, 131.
Blessard *v.* Hurst, 247.
Blissett *v.* Daniel, 128.
Block *v.* Bell, 234.
Blofeld *v.* Payne, 62.
Bloxam *v.* Bell, 155.
Bloxham *v.* Williams, 50.
Boehm *v.* Sterling, 245.
Bœdes Lust, the, 84.
Bolton *v.* Pullen, 143.
——— *v.* King, 234.
Bond *v.* Hanbury, 139.
—— *v.* Pittard, 112.
—— *v.* Gibson, 139.
Bonfield *v.* Smith, 143.
Boosey *v.* Jefferys, 71.
——— *v.* Purday, 70.
Boulton *v.* Bull, 54, 55.
Bourne *v.* Frith, 126.
Boussmaker, *ex parte*, 85.
Bovill *v.* Hammond, 148.
——— *v.* Moore, 55.
Bowman *v.* Nicol, 242.
Branch *v.* Ewington, 45.
Brooke *v.* Enderby, 153, 155.

Brooks *v.* Mitcham, 259.
Brown *v.* Tapscott, 147.
——— *v.* Davies, 245.
——— *v.* Harreden, 250.
——— *in re*, 259.
Bryson *v.* Whitehead, 36.
Buckley *v.* Barber, 131.
Buller *v.* Crisp, 29.
Burchfield *v.* Moore, 237.
Burlton, *ex parte*, 153.
Burton *v.* Wookey, 134.

C.

Carlen *v.* Drury, 135.
Carlos *v.* Fancourt, 234.
Carr *v.* Smith, 147.
Carter *v.* Mureot, 21.
Catherine Maria, the, 88.
Chadwick *v.* Allen, 234.
Chapman *v.* Keane, 255.
Charlton *v.* Poulter, 149.
Charnley *v.* Winstanley, 48.
Chapeler *v.* Durant, 86.
Cheap *v.* Crammond, 115, 142.
Chester & Birkenhead, *in re*, 197.
Chrichton *v.* Gibson, 243.
Chuck, *ex parte*, 116.
Clayton's Case, 155.
Clegg *v.* Levy, 40.
Cleworth *v.* Pickford, 142.
Coffey *v.* Ryan, 147.
Cogg *v.* Bernard, 29.
Colehard *v.* Cooke, 235.
Colley *v.* Smith, 180.
Collins *v.* Young, 162.
Collins *v.* Storry, 160.
Columbia, the, 96.
Const *v.* Harris, 127.
Cook *v.* Collingridge, 128.
Coope *v.* Eyre, 110, 111.
Cooper *v.* Webb, 180.
Cork & Bandon Rail. Comp. *v.* Cazenove, 46.
Cosio *v.* De Bernales, 117.
Cosmopolite, the, 87.
Cothay *v.* Fennell, 151.
Cox *v.* Troy, 249.
Crawshay *v.* Collins, 131, 134, 156.
——— *v.* Maule, 111, 154, 158.
Crossley *v.* Beverley, 56.
Cruikshank *v.* M'Vicar, 126, 148.
Crutnell *v.* Lye, 131.
Cumming *v.* Forrester, 151.

D.

D'Almaine *v.* Boosey, 75, 76.
Dale *v.* Hamilton, 110.
Dalhousie *v.* M'Douall, 37.
Darbishire *v.* Parker, 255.
Daukbarheit, the, 87.
Davenport *v.* Rackstraw, 151.
Dawkes *v.* Earl de Loraine, 235.
De Bergareche *v.* Pillins, 252.
De la Courtier *v.* Bellamy, 235.
De la Vega *v.* Vianna, 41.
Dee, *ex parte*, 196.
Diana, the, 38.
Dickinson *v.* Valpy, 126, 140.
Dingwall *v.* Dunster, 249.
Dolman *v.* Orchard, 153.
Downs *v.* Collins, 111.
Drury *v.* Macaulay, 235.
Dry *v.* Boswell, 112, 113.
Dufaur *v.* Oxenden, 248.
Duke *v.* Drive, 180.
—— *v.* Forbes, 180.
Duncan *v.* Lowndes, 141.
Dutton *v.* Morrison, 160.

E.

Edelsten *v.* Vick, 62.
Edie *v.* East India Comp., 24, 234.
Elgie *v.* Webster, 116.
Eliza Ann, the, 84.
Ellis *v.* Ellis, 236.
Emerson *v.* Davies, 116.
Emily *v.* Lye, 143.
England *v.* Curling, 124.
Esdaile *v.* Sowerby, 253, 250.
Europa, the, 88.
Evans *v.* Bennett, 113.
—— *v.* Drummond, 154.

F.

Fairclough *v.* Sterling, 245.
Faith *v.* Richmond, 140, 143.
Farrar *v.* Beswick, 132.
Fayle *v.* Bird, 253.
Featherstonhaugh *v.* Fenwick, 128, 131, 134, 158.
——— *v.* Hunt, 154.
Felicity, the, 96.

Fenn *v.* Harrisson, 245.
Fentum *v.* Pocock, 249.
Ferguson *v.* Fyffe, 41.
——— *v.* Belsh, 254.
Fisher, *ex parte*, 196.
——— *v.* Leslie, 236.
Foster *v.* Jolly, 238.
Fox *v.* Hanbury, 139, 152, 159.
Franklin *v.* Thomas, 152.
Frederick, the, 39.
Fromont *v.* Coupland, 147.

G.

Gabriell *v.* Evill, 126.
Gale *v.* Leckie, 127.
—— *v.* Walsh, 254.
Galway *v.* Mathew, 143.
Garnock (Viscount) *v.* Duke of Queensberry, 234.
Garrett *v.* Handley, 152.
Gavelle le Sieur, 117.
Geary *v.* Physic, 234.
Geddes *v.* Wallace, 124.
Gellar *v.* Hutchinson, 122.
General Steam Navigation Comp. *v.* Guillou, 41.
Gerish *v.* Lockhead, 122.
Gibson *v.* Lupton, 110.
Giles *v.* Bourne, 235.
Gill *v.* Cubitt, 244.
Gilpin *v.* Enderby, 166.
Glassington *v.* Thwaites, 134.
Godfrey *v.* Turnbull, 153.
Goode *v.* Harrison, 44—46, 117.
Goodman *v.* Whitcomb, 149, 159.
——— *v.* Greenwood, 147.
——— *v.* Harvey, 244.
Gouthwaite *v.* Dickworth, 144.
Grace *v.* Smith, 115, 116, 155.
Grant *v.* Hunt, 249.
Gray *v.* Cookson, 45.
Green *v.* Davies, 234.
Griswold *v.* Waddington, 117, 160.
Grove *v.* Dubois, 151.
Guidon *v.* Robson, 120, 121, 151.
Gute Hoffnung, the, 87.

H.

Hale *v.* Hale, 154, 158, 159.
Halket *v.* Merchant Traders Ins. Comp. 138.
Hallett *v.* Dowdale, 135, 138.
Hall, *ex parte*, *re* N. of Eng. J. S. Banking Comp., 197.
Hamper, *ex parte*, 113, 117, 120.
Hambridge *v.* De la Crouee, 142.
Harker *v.* Anderson, 259.
Harman *v.* Johnson, 140.
Harmony, the, 38.
Harris *v.* Wall, 46.
——— *ex parte*, 124.
——— *v.* Farwell, 154, 161.
Harrison *v.* Jackson, 142.
——— *v.* Rose, 255.
Hart *v.* Alexander, 154.
—— *v.* Prendergast, 108.
—— *v.* Stevens, 246.
Hartley *v.* Wilkinson, 235.
Hassell *v.* M. T. Ship. L. & Ins. Assoc., 138.
Hatch *v.* Searles, 237.
Hawken *v.* Bourne, 139.
Hay *v.* Mair, 154.
Heath *v.* Sansom, 153, 158, 159.
Hedley *v.* Bainbridge, 140.
Henrietta, the, 88.
Hesketh *v.* Blanchard, 120.
Heward *v.* Wheatley, 165.
Heylin *v.* Adamson, 234.
Hill *v.* Koleister, 121.
Hitchcock *v.* Coker, 35.
Hoare *v.* Dawes, 110, 111.
—— *v.* Cazenove, 249.
Hoffnung, the, 96.
Holland *v.* King, 161.
——— *v.* Clark, 108.
Holmes *v.* Blogg, 117.
——— *v.* Higgins, 148, 180.
Hooper *v.* Lusby, 139.
Hoop, the, 86.
Hope *v.* Cust, 141.
Horsley *v.* Rush, 142.
Howe *v.* Bowes, 253.
Hunt *v.* Massey, 46.
Hurtige Hane, the, 98.

I.

Indian Chief, the, 37, 39.
Israel *v.* Israel, 236.

J.

Jacaud *v.* French, 151.
Jackson *v.* Jackson, 131.

Jackson *v.* Sedgwick, 124.
——— *v.* Stopherd, 147
James *v.* Catherwood, 40.
Jeffreys *v.* Bodsey, 71.
Jerbruida, the, 84.
Johanna Tholen, the, 98.
Jones *v.* Ashburnham, 105.
—— *v.* Yates, 151.
—— *v.* Noy, 117, 160.
—— *v.* O'Brien, 256.
—— *v.* Ryde, 245.
Jonge Johannes, the, 88.
—— Klassina, the, 38.
—— Margareta, the, 99.
—— Tobias, the, 99.

K.

Katch *v.* Schenck, 112.
Kell *v.* Hollister, 124.
Kenrick & Maria, the, 96.
Kilgour *v.* Finlayson, 163.
Kirk *v.* Blurton, 140.
Kirwan *v.* Kirwan, 144, 154.
Knill *v.* Williams, 242.
Kuper's Case, 197.

L.

Lady Jane, the, 86.
Lancaster Canal Co. *ex parte*, 186.
Langdale, *ex parte*, 113, 120.
Lavie *v.* Phillips, 48.
Lawson *v.* Weston, 244.
Laycock *v.* Johnson, 233.
Leaf, *ex parte*, 153.
Lean *v.* Schultz, 117.
Lee *v.* Stone, 106.
Leeds & Thirsk Rail. Co. *v.* Fearnley, 46.
Liddiard, *ex parte*, 154.
Likbarrow *v.* Mason, 30.
Lloyd *v.* Archbowle, 151.
—— *v.* Ashby, 144.
—— *v.* Freshfield, 143.
—— *ex parte*, 142.
Loscombe *v.* Russell, 148, 159.
Louis, the, 21.
Louisa Charlotte, the, 88.
Lusk *v.* Elder, 15.

M.

Maclae *v.* Sutherland, 140.
Mahoney *v.* Ashem, 247.
Mair *v.* Glennie, 112, 114.
Mallan *v.* May, 35, 106.
Marguand *v.* N. York Man. Co. 159.
Maria, the, 89.
Marshall *v.* Coleman, 148, 149.
Martin *v.* Chauntry, 234.
Martin *v.* Nicolls, 41.
Mason *v.* Morgan, 245.
Master *v.* Miller, 238.
M'Pherson, 50.
Meigh *v.* Clinton, 126.
Mellish *v.* Rawdon, 246.
Mercurius, the, 99.
Meyer *v.* Sharpe, 112, 114.
Millbank *v.* Revett, 149.
Miller *v.* Aitken, 45.
—— *v.* Race, 244.
Milner *v.* Harewood, 44.
Minet *v.* Gibson, 233, 236.
Minter *v.* Wells, 58.
Mitchel *v.* Reynolds, 35.
Mitchell *v.* Baring, 254.
Montague *v.* Perkins, 236.
Moravia *v.* Levi, 147.
Morgan *v.* Marquis, 160.
Morrison *v.* Moat, 124.
Morris *v.* Barrett, 131.
Morton *v.* Burn, 105.
Muilman *v.* D'Eguino, 246—254.
Mulleck *v.* Radakisson, 247.
Mullett *v.* Hutchison, 140.
Mullins *v.* Hart, 56.
Munroe *v.* Douglas, 39.
Murhead *v.* Salter, 112.

N.

Natush *v.* Irving, 127.
Nerot *v.* Burnand, 156, 160.
Neptunus, the, 96, 97, 98.
Newmarsh *v.* Clay, 122.
Newton *v.* Boodle, 140.
Newsome *v.* Coles, 153.
Nicholson *v.* Gouthet, 250.
Noble *v.* Durall, 25.
Nockels *v.* Crosby, 147.
N. West. Rail. Co. *v.* M'Michael, 46.
Nye *v.* Beale, 110.

O.

Oldaker *v.* Lavender, 127.
Oliphant, 50.
Oliver *v.* Hamilton, 149.
Orozembo, the, 39.
Osborne *v.* Harper, 152.

P.

Parkyn *v.* Fry, 180.
Parker *v.* Carruthers, 153.
Parsons *v.* Crosby, 151.
Paterson *v.* Zechariah, 154.
Peacock *v.* Peacock, 132, 156.
Pearce *v.* Pearce, 160.
Pease *v.* Hirst, 152.
Pears *v.* Piper, 158.
Peele, *ex parte*, 140.
Perry *v.* Skinner, 60.
Peto *v.* Reynolds, 234.
Philips *v.* Astling, 253.
Pierson *v.* Dunlop, 248.
Pillans *v.* Van-Mierop, 248.
Pirie *v.* Smith, 236.
Pitchford *v.* Davis, 180.
Pleylyn *v.* Adamson, 244.
Pocock, *ex parte*, *re* Direct. Lond. & Man. Rail. Co. 192.
Portland, the, 38.
Pott *v.* Eyton, 113.
Potts *v.* Bell, 86.
Price *v.* Neal, 249.

R.

Raba *v.* Ryland, 139.
Rapid, the, 86.
Rapp *v.* Latham, 139, 142.
Rawlinson *v.* Clarke, 112.
——— *v.* Stone, 246.
Regende Jacob, the, 99.
Reg. *v.* Inhab. of Northwingfield, 105.
—— *v.* Cutler, 55.
Reid *v.* Hollinshead, 114, 139.
—— *v.* Allan, 138.
Rex *v.* Dodd, 135.
—— *v.* Mill, 60.
—— *v.* Wheeler, 55.
Rex *v.* Box, 236.
Richardson *v.* Gilbert, 66.
Roberts *v.* Peake, 234.
Robertson *v.* French, 106.
Robinson *v.* Wilkinson, 122.
Robson *v.* Drummond, 152.
Rogers *v.* Herron, 254.
Rousego *v.* Conne, 255.
Rose *v.* Himley, 41.
Rothschild *v.* Corney, 259.
Rowlandson, *ex parte*, 112, 113.
Rugby *re* Warw. & Worc. Rail. Co. 197.
Russell *v.* Smith, 69.
——— *v.* Langstaffe, 253.
——— *v.* Kitchen, 233.

S.

Sainsbury *v.* Parkinson, 243.
Sanderson *v.* Brooksbank, 142.
Sander *v.* Sander, 160.
Sandiland *v.* Marsh, 140—142.
Santa Cruz, the, 85.
Saunderson *v.* Piper, 234.
Saville *v.* Robertson, 141, 144.
Sayer *v.* Bennett, 117, 160.
Sea & Fire Ass. Soc. *ex parte* Harvey, 138, 165.
Serle *v.* Norton, 235.
Shackle *v.* Baker, 131.
Sharpe *v.* Price, 255.
Shireff *v.* Wilks, 140, 144.
Shuttleworth *v.* Stevens, 234.
Sigourney *v.* Lloyd, 244.
Sinclair *v.* Baggaley, 235.
Skinner *v.* Stocks, 151.
Smith *v.* Barrow, 147.
——— *v.* Craven, 140.
——— *v.* Jeffreys, 107.
——— *v.* Wilson, 107.
——— *v.* Watson, 112.
——— *v.* Kendall, 243.
Solomons *v.* Bank of England, 244.
Somerville *v.* Mackay, 149.
Spackman, *ex parte*, *in re* Agr. Cat. In. Comp. 196.
St. Antonius, the, 96.
Stead *v.* Salt, 142.
—— *v.* Carey, 60.
Stewart *v.* Forbes, 132, 133.
Stocker *v.* Brocklebank, 112.
Stone *v.* Marsh, 142.

Storm *v.* Sterling, 236.
Strange *v.* Price, 255.
Street *v.* Rugby, 124.
Swan *v.* Steele, 140.
Sykes *v.* Sykes, 62.

T.

Tallis *v.* Tallis, 35, 36.
Tatersall *v.* Grote, 124.
Tatlock *v.* Harris, 236.
Taylor *v.* Croker, 47.
——— *v.* Field, 152.
——— *v.* Dobbins, 399.
Teague *v.* Hubbard, 147.
Templeton *v.* Macfarlane, 55.
Thickness *v.* Bromilow, 139, 140.
Thornton *v.* Illingworth, 152.
Tindall *v.* Brown, 254.
Turner *v.* Hayden, 253.
Twee Gebroeders, the, 22.

U.

United States Bank *v.* Binney, 119, 137.
——————— *v.* Mason, 139.
Universal Salvage Comp. *in re*, 197.

V.

Venning *v.* Leekie, 147.
Vere *v.* Ashby, 139.
Vice *v.* Fleury, 135.
Vigilantia, the, 39.
Vookey *v.* Poole, 244.
Vriendschap, the, 88.
Vrow, the, 88.
—— Judith, the, 96.
—— Elizabeth, the, 39.

W.

Walstab *v.* Spottiswoode, 132, 180.
Walker *v.* Witter, 41.
Walton *v.* Dodson, 152.
——— *v.* Potter, 55.
Wallworth *v.* Holt, 148.
Warwick *v.* Bruce, 47.
Waters *v.* Taylor, 117, 150, 159.
Waugh *v.* Carver, 115, 120.
Wedderburn *v.* Wedderburn, 107.
Wheatley *v.* Williams, 235.
Wheaton *v.* Peter, 64.
Wiffen *v.* Roberts, 250.
Wilhelmsberg, the, 95.
Williams, the, 86, 95.
Williams *v.* Jones, 106, 126, 144.
——— *v.* Keats, 153.
——— *v.* Noble, 159.
——— *v.* Germaine, 249.
——— *v.* Van Mierop, 248.
Wilke *v.* Wilson, 245.
Wilkinson *v.* Frazier, 113.
Wilsford *v.* Wood, 152.
Wilson *v.* Cutting, 147.
——— *v.* Greenwood, 149.
——— *v.* Whitehead, 141.
——— *ex parte*, 116.
Windle *v.* Andrews, 254.
Wintle *v.* Crowther, 122.
Winter *v.* Innes, 154.
Wish *v.* Small, 114.
Wolff *v.* Oxholin, 85.
Wood *v.* Braddick, 142, 153.
Woode *v.* Fenwick, 45.
Wray *v.* Milstone, 147.
Wrexham *v.* Huddleston, 48, 160.
Wynne *v.* Raikes, 248.

Y.

Yates *v.* Boen, 48.
—— *v.* Sherrington, 246.
Young *v.* Axtell, 122, 155.

ABBREVIATIONS OF AUTHORITIES AND OF REPORTS OF CASES.

A. & E.	Adolphus & Ellis, Queen's Bench.
Acton	Acton, Admiralty.
B. & Ad. . . .	Barnwell & Adolphus, Queen's Bench, New Cases.
B. & A. or B. & Ald.	Barnwell & Alderson, King's Bench.
B. & B.	Broderip & Bingham, Common Pleas.
B. & C.	Barnwell & Creswell, King's Bench.
B. & P.	Bosanquet & Pullar, Common Pleas.
Beav.	Beavan, Chancery.
Bing.	Bingham, Common Pleas.
Bing. N. C. . .	Ditto, New Cases, Common Pleas.
Bligh	Bligh, House of Lords.
Burr.	Burroughs, Common Pleas.
C. & Fin. N. S. .	Clark & Finlay, New Series.
C. & J.	Crompton & Jervis, Exchequer.
C. & M.	Crompton & Meeson, Exchequer.
C. & P.	Carrington & Paine, Queen's Bench.
Camp.	Campbell, Nisi Prius.
Car. & Kirw. . .	Carrington & Kirwan, ditto.
C. B.	Common Bench, Manning, Granger & Scott.
Cl. & Finl. . .	Clark & Finlay, House of Lords.
Com. Dig. . . .	Comyn's Digest of the Law.
Cowp.	Cowper, Queen's Bench.
Cranch	Cranch, American Reports.
Deac.	Deacon, Bankruptcy.
Dods.	Dodson, Admiralty.
Doug.	Douglas.
Dow	Dow, House of Lords.
Dow. & Ry. . .	Dowling & Ryland, King's Bench.
East	East, King's Bench.
Edw.	Edwards, Admiralty.
Eq. Dig. . . .	Common Law and Equity Report.
Esp.	Espinasse, Nisi Prius.
Exch.	Exchequer Reports, Crompton, Meeson & Roscoe.
Gallis.	Gallison, American Reports.

Hagg.	Haggard, Admiralty.
Hare	Hare, Chancery.
H. Bl.	Henry Blackstone, Common Pleas.
W. Bl.	William Blackstone, Common Pleas.
Jac. & Walk. . .	Jacob & Walker, Chancery.
Jer.	Jeremiah, Bible.
John	John, American Reports.
L. J. C. P. . . .	Law Journal, Common Pleas.
L. J. C. C. . . .	Ditto, Chancery.
L. J. Q. B. . . .	Law Journal, Queen's Bench.
L. J. N. S. Q. B. .	Law Journal, New Series, Queen's Bench.
L. T.	Law Times.
M. & G.	Manning & Granger, Common Pleas.
M. & M.	Moody & Malkin, Nisi Prius.
M. & Ry. . . .	Moody & Ryan, Nisi Prius.
M. & S.	Maule & Selwyn, King's Bench.
M. & W. . . .	Meeson & Welsby, Exchequer.
Mad.	Maddock, Chancery.
Marsh.	Marshall, Common Pleas.
Mason	Mason, American Reports.
Mer.	Merivale, Chancery.
Mod.	Modern Cases in Law and Equity.
Moore, Rep. P. C. .	Moore's Privy Council Reports.
My. & C. . . .	Mylne & Craig, Chancery.
Nehem.	Nehemiah, Bible.
Nev. & Perry . .	Neville & Perry, Queen's Bench.
Peters	Peters, American Reports.
Q. B.	Adolphus & Ellis, Queen's Bench, New Cases.
Rob.	Robinson, Admiralty.
Rose	Rose, Bankruptcy.
Russ.	Russell, Chancery.
Sim.	Simons, Chancery.
Sim. & Stu. . .	Simons & Stuart, ditto.
Smith's Lead. C. .	Smith's Leading Cases.
Stark.	Starkie, Nisi Prius.
Story	Story, American Reports.
Swanst.	Swanston, Chancery.
Taunt.	Taunton, Common Pleas.
T. R.	Durnford & East, Term Reports, King's Bench.
Tyrwh.	Tyrwhitt in the Exchequer.
Ves.	Vesey, Chancery.
Ves. & Beav. . .	Vesey & Beavan, Chancery.
W. Bl.	William Blackstone, Common Pleas.
Wheat.	Wheaton, American Roports.
Y. & C. C. . . .	Young & Collier, Chancery.

MANUAL OF MERCANTILE LAW.

BOOK I.
ON COMMERCE.

CHAPTER I.

PROGRESS OF COMMERCE.

1. The Author of the universe has wisely scattered his gifts over the surface of the earth. Differences of soil and climate, multifarious wants, and various degrees of talent, knowledge, and skill, all contribute to render mutual dependence one of the essential elements of society. By means of commerce—that is, the relation of mutual interests by which things or rights may be acquired or exchanged—provisions are equally distributed among countries, the comforts and enjoyments of life are richly provided, civilization and progress are promoted and extended, and the powers and capacities of man and countries are called forth, to minister to the great sum of human happiness. Limited at first to the mere exchange of what was superfluous for what was needful, and between families and families, it gradually extended from family to tribe, from tribe to people, and from country to country; whilst new wants, successful adventures, curiosity, enterprise, and interest, led commerce to overstep the boundaries of inland territories, and to encompass the world as the unlimited field of its action.

2. Assyria, Phenicia, Carthage, and Egypt, rich in their productions and prodigal in their use of luxuries, were the first nations which cultivated commerce. Greece, surrounded and intersected by seas, with spacious bays and commodious

harbours, possessed abundant scope for mercantile adventure; nevertheless her commerce was circumscribed to the Mediterranean, and seldom extended to the ports of Egypt, or the countries around the Euxine sea. Athens, proud of her maritime conquests, claimed the sovereignty of the sea; and Corinth, the metropolis of Grecian art, carried on an extensive commerce in the merchandise of Asia and Italy. Led by the valorous arms of Alexander, the Greeks enlarged their power in the East, and Alexandria was founded, destined to become the centre of the future commerce of the world. The Phenicians and Carthaginians, notwithstanding the smallness of their ships and their imperfect knowledge of navigation, sailed along the coasts of Spain to the Pyrenees, where they found gold and silver mines. In search of other metals, they risked their expeditions to the Cassiterides Islands, or Scilly, and thus discovered Great Britain.[1] Carthage, mistress of the African coasts in the Mediterranean, rivalled Marseilles, already eminent in her commercial enterprise, and they were often at issue on the question of their fisheries; until, strong in the protection of the Romans, the power of Marseilles predominated, and was further increased by the fall of Carthage and Corinth.

3. The military spirit of the Romans, the form of their government, and their passion for glory, were unfavourable to the sober pursuits of trade and commerce. Agriculture, which was the cradle of their captains, was the only art they cultivated, and they prohibited commerce to their nobles and senators:[2] even Cicero regarded it as being inconsistent with the dignity of the masters of the world.[3] But their increasing wants, their alliance with maritime countries, and the example of other nations attaining immense wealth by commerce, led them ultimately to dismiss their prejudices, and to pursue it with ardour and success. Rome, exhausted by profusion and luxury, depressed by military despotism, and with scattered possessions, bound to her by scarcely any ties of

[1] Strabo, lib. iii. p. 265.

[2] Code iv. 63. 3.

[3] Cicero, Orat. in Verrem, lib. v. § 18.

common interest, gradually crumbled, and her power ceased to control the destinies of the world. In the fourth century of the Christian era Constantine removed the seat of government from Rome to Constantinople, and thenceforth the Roman empire was divided into the Eastern and Western empire. Taking advantage of this fatal division, the Visigoths commenced their inroads into the northern provinces, and, together with the Burgundians, Franks, and Vandals, they succeeded in pillaging Rome itself. The invasion of the barbarians brought devastation over Europe, and commerce became all but extinct. It was then that the right of wreck was barbarously assumed; but, as all strangers were regarded as enemies, they were deemed to deserve neither justice nor pity.

4. The subversion of the Roman empire—which embraced for nearly four hundred years all Italy, Spain, France, England, large portions of Austria and Germany, Sicily, Greece, the Mediterranean islands, Turkey, Africa, and Egypt—caused Europe to be parcelled out into many small, independent, and even rival communities. All communications were intercepted by an atrocious brigandage, and swarms of pirates infested the seas. Whilst Constantinople was still preserved to the Romans, Egypt was torn from the Eastern empire by the Arabs, and much of the Eastern commerce fell into the hands of the barbarians. The Venets, an ancient people possessing the fertile country watered by the "Po," suffered in common with others from the cruelties and ravages committed by the invaders, and were driven to find a refuge in some small muddy islands in the northern extremities of the Adriatic—the humble origin of the illustrious Venice. Italy now rose from the torpor it had fallen into; Genoa, Florence, and Pisa, became great commercial cities, and rivalled each other in the extension of their trade and in the superiority of their manufactures. They carried on prosperously the commerce of the Morea, the Levant, the Black Sea, and that of India and Arabia, by Alexandria. Flanders was during this period the general warehouse of the north of Germany, England, and

France, and the depository for the exports of Italy northward. The benefits of commerce were early appreciated in England; Athelstan bestowed the privilege of a Thane on every merchant who made three voyages over the sea with a vessel and cargo of his own.

5. The commencement of the eleventh century witnessed the rise of a singular phenomenon in the feeling and attitude of Europe. The frantic zeal of an hermit, and the cogent appeals of Urban II., excited the lately converted Christian nations to a crusade to drive the Turks from Jerusalem. Religious enthusiasm pervaded all classes; property was sacrificed, and the feudal lords, to provide for their equipment, disposed of their lands and of their *suzeraînté* over vassal towns. Hundreds of thousands flocked to the Italian cities, for the Holy Land—a rich harvest to Venice, Amalfi, Florence, Pisa, Marseilles, and Naples, whose commerce acquired thereby a new and powerful impulse.

6. Although the revival of commerce increased the comforts and enjoyments of all classes, and liberalised and expanded their ideas, Europe had not yet emerged from the chaos of barbarism and oppression which found a new element in the prevailing ignorance and superstition. The Jews—the ready victims of capricious rulers, and objects of contempt to the barons and lords—were alternately cajoled, persecuted, courted, and chased from State to State. Their knowledge of merchandise, and their skill in acquiring wealth, together with their dealing in money (then proscribed by the theologians), excited unremitted jealousy; and, being driven to rescue their wealth from the rapacious hands of their persecutors, they invented bills of exchange. The origin of these instruments is variously ascribed. It is probable that several causes concurrently tended towards the invention and full appreciation of such documents. The necessity of remitting money to other places, and the difficulty of carrying back large amounts of coin from public fairs, may have probably led to the use of letters of credit, and, by a natural transition, to bills of exchange. Some writers ascribe the invention to the Florentines; who,

driven from their country by the Tuscan factions and the civil wars between the Guelphs and Ghibelines, took refuge in France and Amsterdam, where they used exchanges to withdraw with as little expense as possible the rents of their property. Towards the thirteenth century the mariner's compass was in common use among the Mediterranean States. The invention of this invaluable instrument is attributed to Flavio Gioja, a citizen of the commercial city of Amalfi.

7. Gradually the tide of European commerce flowed northward. Already the Baltic ports had acquired some importance. The commerce of Britain was then by no means inconsiderable, and several maritime ordinances were enacted on the borders of the Atlantic Ocean. The Rôles d'Oléron, ascribed to Richard I. on his return from the crusade, but which really emanated from Eléonore de Guyenne, were afterwards acknowledged as part of the common law of England, in the reign of Edward III.,[1] in the celebrated Inquest of Queenborough. The Rôles d'Oléron possess some remarkable regulations to repress the enormities committed under the barbarous right of wreck. As pilots, to ingratiate themselves with their lords, wilfully ran the ships upon the rocks, the ordinance declared such pilots accursed and excommunicated, and inflicted upon them and their lords condign punishment.

8. Europe now breathed a more tranquil atmosphere, but commerce greatly suffered from general insecurity. Cities were destroyed by pirates and robbers, and inland carriage was exposed to constant rapine. It was to offer armed resistance to this wanton invasion of private right, and to protect their own trading, that Lubeck and Hamburg formed an association for mutual defence, which gave rise to the Hanseatic League—a confederacy powerful and flourishing, and which, previously

[1] Edward III. was a bold commercial legislator. His reign was fruitful in experiments to foster, by artificial means, the industry and commerce of England. This was an era of protective enactments; restrictive regulations were made against forestalling, regrating and engrossing, and the price of sale of certain articles was fixed by law. Wool was then the staple of England; cattle and salmon were the principal articles of export from Scotland; and Ireland possessed considerable manufactures, and exported large quantities of grain.

to the end of the thirteenth century, embraced the most opulent commercial cities of Europe. The league comprised seventy-two separate states, divided into four circles, of which Lubeck, Cologne, Brunswick, and Dantzig, were the presiding cities; and it possessed four great factories—at London, Bruges, Bergen, and Novogorod. This mercantile association assumed the sovereign rights of a powerful confederation, formed treaties of commerce, fitted out an armed navy, and its merchants enjoyed privileges in all countries. When foreigners were prohibited in England from acting as brokers or selling goods by retail, the Hanse merchants were excepted, and their franchise and ancient privileges were guarded and confirmed. At this period the whole commerce of Europe was carried on by the Hanseatic League in the north, and by the Italian or Mediterranean States in the south.

9. But a great revolution was soon to give an unparalleled activity and extension to European commerce. Portugal, animated by a spirit of adventure, and influenced by a missionary fervour, lent her might to maritime discoveries and conquests. The possibility of sailing round Africa being established by tradition, observation, and experience, King John ardently sought the accomplishment of this great object. The command of three small vessels for the purpose was given to Bartholomew Diaz, and in 1493 the little squadron succeeded in sailing round the southern promontory of Africa; the tremendous Cape which Diaz denominated *Il Capo dos Tormentos*, but which the exulting king called by a more appropriate name, *Il Capo del Bueno Esperanza*. The discovery of the great Indian continent was left by King John as a bequest to his successor Emmanuel. The expedition was confided, in 1497, to Vasco de Gama, who, bold, intrepid and persevering, was destined to become the instrument of opening that unexhausted vein of wealth, those myriads of people, and that fruitful field for science, to the energy, enterprise, and research of European civilization. About this time the great Italian mariner, Christopher Columbus, conceived the bold idea of ascertaining the existence of a new world;

and, in despite of ridicule, apathy, and contumely, he succeeded in discovering in the American hemisphere a land rich and beautiful. These discoveries inflamed the Spaniards and Portuguese with extravagant ideas. Wealth they deemed synonymous with money, scarcely conceiving it to consist of anything useful or agreeable possessing an exchangeable value; for the acquisition of gold they therefore wholly neglected the arts and manufactures. Yet, however mistaken the value they attached to gold, it was a wonderful discovery, which enriched Europe with a metal so eminently fitted to be the instrument of commerce and the measure of value. From the discovery of America in 1492, to the end of 1803, the gold and silver imported into Europe from that country, is estimated to have amounted to 1,122,997,475*l.*, and from 1804 to 1848, a period of forty-five years, to 360,579,545*l.*, or in all not less than 1,483,577,020*l.*[1] This immense amount of wealth was further increased in 1848, by the discovery of gold in California. From the colonization of America and India may be dated the commencement of the modern colonial system, which was subsequently so eagerly extended by European nations. The success of Spain and Portugal stimulated England to attempt the discovery of unknown countries. Henry VII., who had neglected the proposal of Columbus, granted a patent to John Cabot, a citizen of Venice residing at Bristol, and his sons, authorizing them to "seek out and discover all islands, regions, and provinces whatsoever, that may belong to heathen and infidels, and to subdue, occupy, and possess their territories, as his vassals and lieutenants:" they accordingly set out with four ships, and discovered the coast of Labrador.

10. Italy, which had hitherto monopolised the commerce of India through Egypt, soon found that the Portuguese discovery of a sea-passage to that country robbed her of that important trade, and she was compelled to mourn the departure of the times when Venice, and Genoa, and Pisa, covered the Mediterranean with their galleys. France felt the invi-

[1] See Journal of the Statistical Society, vol. xiv. p. 44.

gorating influence of trade; Amsterdam and Antwerp became great marts of merchandise, and England commenced her career of commercial greatness, in which she carried the palm over all nations. Owing to the new direction of mercantile enterprise, the Hanseatic League, which since the middle of the fifteenth century began to decline, now dwindled into insignificance: its immunities were withdrawn, and city after city disclaimed their allegiance. The free Hanseatic cities, recognised by the treaty of Vienna of 1815 as portions of the Germanic confederation, are to this day a standing monument of their once powerful influence. Their commerce and shipping are still not unimportant; the exports of British produce to the free towns, in 1852, being 6,872,753*l.*, or nearly nine per cent. of the total exports of the United Kingdom. The decline of the commercial power of the Hanseatic League was succeeded by the increasing influence of the Dutch, who extended their colonial acquisitions, whilst Russia also assumed a highly commercial character. During the sixteenth century the power and commerce of England attained paramount importance. Her maritime discoveries, and the enterprise of her merchants, had secured large markets for her produce and manufactures; and her colonial possessions extended over North America, the West Indies, and South Africa.

11. In 1600 the East India Company was formed. This company, whose military exploits have eclipsed its mercantile achievements, has gradually extended the power of England over a vast territory, having an area of 748,000 miles, and a population of 104,000,000 inhabitants. The civil dissensions during the reign of the Stuarts gave place to the British Commonwealth, under its Protector Cromwell. The commercial prosperity of the Dutch excited his jealousy, and he directed the most vigorous efforts to subdue their naval power. Hence the great Navigation Charter of 1651, by which the trade with Asia, Africa, and America, was restricted to British ships, and to those belonging to their own countries. The European trade was put on the same footing, except for

certain enumerated articles, and the trade with the colonies was entirely reserved to Great Britain, as also the coasting trade and the fisheries. This charter was confirmed and enacted by Charles II. in 1660.

12. France, during the reign of Louis XIV., possessed the great Colbert, whose enlightened mind laid the most solid foundation for her commercial prosperity. It was under the auspices of this illustrious legislator that the Ordinances de la Marine et de Commerce were constructed, in 1681—the first systematic and complete body of laws relating to commerce by sea and by land published in Europe, and which became immediately the basis of the maritime legislation of Europe. Unfortunately the French court was under the influence of religious bigotry, and lent its power to one of the most nefarious and injurious acts of oppression ever committed against its citizens. The large number of members of the Reformed Church had, since the accession of Henry IV. to the throne of France, enjoyed privileges guaranteed to them by the State. These were withdrawn by Louis XIV. in 1685; and with the revocation of the Edict of Nantes more than three hundred thousand persons, working-men and manufacturers, abandoned their country, to find among strangers hospitality and religious liberty: they spread themselves over the north of Germany, the Netherlands, and England, which countries were enriched by their arts, manufactures, and industry.

13. The eighteenth century found trade steadily advancing throughout Europe; and treaties of commerce had been formed between its States. England and Scotland were united into one kingdom—an union which proved most auspicious to the subjects of both States, and whereby they entered into a perfect communion of all the rights, privileges, and advantages belonging to the subjects of either kingdom. Shortly after this period, in 1720, extraordinary schemes were propounded in Great Britain and France, for supplying the State with large sums of money, by granting privileges to trading companies. The South Sea Company in this country, and the Mississippi Company in France, introduced a spirit of

inordinate speculation, which ended in disappointment and grievous disasters. Meanwhile the commerce of Europe was constantly opening up fresh sources of development, by the discovery of new articles of traffic, and by the increase of resources among all classes.

14. Navigation was also making considerable progress, and attempts were made in England in 1736, by Jonathan Hull, for applying the steam-engine to the purpose of propelling vessels. It was during this same period, in 1747-8, that the first American cotton was shipped to Europe from Charleston, a trade which afterwards, owing to the immense stimulus given to the consumption of cotton manufactures by the invention of spinning-engines in 1768, enlarged to an enormous extent. The commerce of Great Britain with the American colonies was in 1765 completely arrested by the obnoxious stamp-duties imposed on them. This mistaken policy caused the declaration of independence by the United States in 1776, and was followed by the American war, which was only brought to a final termination in 1783. Thenceforth the youthful republic—fertile in resources, with a population industrious, energetic and enterprising—attained a position second to none in the rank of civilized States. The population, which in 1790 numbered only 3,929,827, had increased in 1850 to 23,246,301.

15. The American war was the forerunner of the French revolution, which was succeeded by the unparalleled triumphs of Napoleon: these convulsed the whole of Europe, and kindled a war the fierceness and extent of which far exceeded all former ones. During its progress trade was diverted from its usual course, and the belligerents resorted to most extreme means in order to destroy each other's power. Whilst, however, France was the crater of such volcanic commotions, the genius of Napoleon was laying the foundation of a complete reform in the legislation of Europe; his Codes became a patrimony of invaluable wealth, for which all nations became indebted to the valorous commander who proved to be also a sagacious legislator. The treaty of Vienna having put an end to the wars which for so long a time devastated Europe, a new era was opened in international commerce. The appli-

cation of steam power to navigation and railways, and the invention of the electric telegraph, have combined to give to commerce, during a peace of nearly forty years, a rapid and unparalleled extension.

16. If the fifteenth century offers the two greatest landmarks in the history of commerce—the discovery of a passage to the East Indies by the Cape of Good Hope, and the discovery of America, which opened to Europe new and inexhaustible markets—the nineteenth century is remarkable for the invention of those means by which the most distant nations are brought into closer contact, their resources easily distributed, and civilization and commerce largely promoted. After several fruitless attempts, the application of the steam engine to the purpose of propelling vessels was successfully carried out by Fulton, of the United States, in 1807, and Henry Bell, on the Clyde, in 1812; and with it a change full of promise has come over the world, such as neither philosophers nor statesmen of former times could have anticipated. The navigation of the Atlantic, hitherto most uncertain and dangerous, has become easier than a voyage to the Mediterranean; and instead of fifty and even a hundred days formerly expended in the voyage from Liverpool to New York, steamers now make the passage in nine or ten days. A speculative mania characterised the years 1825-26, when numerous schemes of foreign loans, mines, canals, &c. were projected, requiring a capital of about 350,000,000*l.* The modern railway system of Europe dates from 1830, when the opening of the line between Liverpool and Manchester inaugurated a wonderful change in inland travelling and traffic. In 1827 the first union of German States originated in *der Mittel Verein*, or Central Association of Thuringia, which, in 1833, expanded into the celebrated convention styled the Zoll-verein, or union of customs, comprising all the northern and south-western German States. A new article of commerce was introduced in 1841, by the importation of guano into the United Kingdom, from Chili, Peru, and Bolivia: the article proved to be a most excellent manure, and became the object of extensive operations.

17. At this period a momentous event occurred in the history of civilization. The Chinese, a people whose annals date from the remotest antiquity, had hitherto succeeded in remaining isolated from European contact. They loved their own seclusion, but British enterprise did not allow them to enjoy it. A war followed between China and Britain in 1839, on the subject of the opium trade, which was interdicted by the Chinese Government since 1834; and the successes of the British arms, in 1842, resulted in five important ports of China being thrown open to the commerce of the world. A revolution has recently occurred, which all but subverted the Tartar dynasty, and is on the eve of effecting a total reform in the religion, habits, and intercourse of the Chinese empire.

18. In 1845-46 the railway mania commenced, and the value of all descriptions of shares rapidly rose to an exorbitant height. A monetary crisis ensued, and they were subjected to a serious depreciation. But as soon as the temporary derangement ceased, railway property became a permanent and solid source of investment.[1] The enthusiastic activity with which line after line was projected and constructed in the United Kingdom soon extended to Europe, and has been rivalled by America.[2]

[1] PROGRESS OF THE RAILWAY SYSTEM.

Date.	Miles open.	Number of Passengers.	Receipts from Passengers.	Receipts from Goods.	Total Receipts.
			£	£	£
1843	1,952	23,466,896	3,110,257	1,424,932	4,535,189
1844	2,148	27,763,602	3,439,294	1,635,380	5,074,674
1845	2,343	33,791,253	3,976,341	2,233,373	6,209,714
1846	2,765	43,790,984	4,725,216	2,840,353	7,565,569
1847	3,603	51,352,163	5,148,002	3,362,883	8,510,886
1848	4,478	57,965,070	5,720,382	4,213,169	9,933,552
1849	5,447	60,398,159	6,105,975	5,094,925	11,200,961
1850	6,308	66,840,175	6,465,576	5,942,276	12,407,852
1851	6,698	78,969,623	7,177,341	6,719,559	13,896,900
1852	7,076	86,758,997	7,984,652	7,464,159	15,448,811

CAPITAL.

Date.	By Shares.	Loans.	Total.	Authorised previous to Dec. 31, 1852.
	£	£	£	£
1848	156,508,578	43,664,480	200,173,058	—
1849	178,412,625	51,335,154	229,747,779	—
1850	184,763,677	55,507,068	240,270,745	—
1851	189,554,179	58,686,717	248,240,896	—
1852	200,101,012	64,064,668	264,165,680	356,610,456

[2] The number of miles of railway in operation in the United States of

19. A deficient harvest in the United Kingdom, in 1845, caused the great question of the Corn Laws, which had for several years been agitated, to become the subject of animated discussion, and they were entirely repealed in 1846. Thenceforth the free-trade policy, which had been introduced since 1842 by Sir Robert Peel, became permanently established. The restrictions of the Navigation Laws, which remained in force since the Charter of 1651, had already been partially rescinded in 1815, by the reciprocity system called forth by the retaliatory measures adopted first by the American Congress. Reciprocity treaties were also concluded with most States of Europe and America, until, in 1848, as a necessary complement of the great measure for abolishing the Corn Laws, all artificial hindrances respecting navigation were removed from international commerce; and even the protection of the coasting trade was formally abandoned in 1854.' The discovery of gold in California and Australia, during 1849 and 1851, introduced a sudden change in the prospects of commerce. Whilst the amount of gold and silver produced in 1846, was 12,362,677*l.*, the present annual supply has risen to about 47,000,000*l.* sterling. This unprecedented influx of the precious metals gave rise to theoretical speculations as to the probable effects it would have on the public funds, prices of labour, produce, and articles of manufacture, and on the value of fixed property. A temporary alarm was spread as to the possible rejection of the gold standard, in view of the altered relative value of gold to silver, and in some States gold was no longer held a legal tender. But if the production of the precious metals increased four-fold, a considerable augmentation took place in the consumption of them. With the increase of commerce, extensive emigration, high wages, and the improving condition of the masses, the amount of currency required is considerably larger, whilst extensive shipments are also made to India, China, and Australia. The

America, in 1851, was 10,289, and the cost of construction was 66,644,907*l.* In 1853 the number of miles in operation was 13,315, and in process of construction 13,029 miles.

[1] 17 Vict. c. 5.

coinage of the most important countries in the world, in the last six years, amounted to 166,793,579*l.* Of this, the gold coinage was about 113,000,000*l.*; from which deducting 18,000,000*l.* estimated to have been re-coined, we have 95,000,000*l.* as the gold coinage added to circulation from 1848 to 1853, but the greater portion in the last three years.

20. The golden discoveries suddenly creating a new empire in our antipodes, gave an immense stimulus to British commerce, and the exports of produce and manufacture from the United Kingdom rose, in 1853, to the enormous sum of 98,933,781*l.*; which, compared with 1846, when they amounted to 57,786,876*l.*, shows an increase of about 32 per cent. The same extension is observable in all other branches of trade. The tonnage of British and foreign vessels entered and cleared at ports in the United Kingdom, in 1846, was 12,415,586 tons; in 1853 it reached 18,390,710 tons. The quantity of cotton imported, during the same years, increased from 467,856,274 lbs. to 895,266,780 lbs., and of wool from 65,255,462 lbs. to 119,396,445 lbs.; whilst the importation of all kinds of grains, which in former periods was most irregular and limited, has increased, since 1846, to an annual average of 9,000,000 quarters. The extent and character of international commerce could not be better exhibited and illustrated than by the following tables, showing the amount and distribution of the (1) Exports of the United Kingdom, (2) the United States of America, and (3) France, in the year 1852, arranged according to their importance, and with the proportion which they bear to each special trade.

From this brief historical glance of the progress of commercial enterprise to the present times, it will be seen how much has been accomplished in the advancement of science, arts, manufactures, navigation, and commerce, during a long period of peace. The produce of the earth is now swiftly interchanged between all nations; the power of the elements has been partially subdued; space is all but annihilated; and, with the rapidity of lightning, we communicate thought to the furthest regions: in effect, the whole world has become a vast commercial commonwealth.

I.—THE UNITED KINGDOM.

	COUNTRIES.	Proportional per centage exported to different countries.	Declared Value.
			£
1.	United States and California	21.2197	16,567,737
2.	East Indies	9.4125	7,352,907
3.	Hanse Towns	8.8025	6,872,753
4.	Australia	5.4077	4,222,205
5.	Holland	5.2639	4,109,976
6.	Brazil	4.4037	3,464,394
7.	North American Colonies	3.9212	3,063,364
8.	France	3.4982	2,731,286
9.	China	3.2065	2,503,599
10.	Turkey	2.6639	2,079,913
11.	West Indies	2.4445	1,908,552
12.	Spain	1.6060	1,253,957
13.	Chili	1.4824	1,167,494
14.	Portugal	1.4042	1,104,213
15.	Russia	1.4087	1,099,917
16.	Belgium	1.3787	1,076,499
17.	Cape of Good Hope	1.3606	1,064,283
18.	Cuba	1.3231	1,033,396
19.	Peru	1.3111	1,024,007
20.	Egypt	1.2249	955,701
21.	Sardinia	1.1833	924,225
22.	Two Sicilies	1.1672	911,658
23.	Buenos Ayres	1.0852	837,513
24.	Tuscany	0.8882	698,749
25.	Austria	0.8635	674,423
26.	Java and Sumatra	0.7928	619,185
27.	Urughay	0.7880	615,453
28.	Prussia	0.7450	581,834
29.	Channel Islands	0.7227	564,453
30.	West Coast of Africa	0.6867	536,358
31.	Syria and Palestine	0.6672	511,096
32.	Gibraltar	0.6541	510,889
33.	New Granada	0.6428	502,128
34.	Denmark	0 5793	452,436
35.	Sweden and Norway	0.5621	439,010
36.	Mexico	0.4686	366,020
37.	Hanover	0.4684	365,843
38.	Venezuela	0.3504	273,738
39.	Wallachia and Moldavia	0.3450	269,533
40.	Malta	0.3288	256,867
41.	Hayti	0.3219	251,409
42.	Mauritius	0.2941	229,693
43.	Papal States	0.2410	188,231
44.	Greece	0.1953	152,527
45.	Ionian Islands	0.1775	138,642
46	Philippine Islands	0.1426	115,303
47.	Morocco	0.1411	110,126
48.	Azores, Madeira	0.1348	105,304
49.	Canary Islands	0.0507	39,641
50.	Other Countries	1.2781	998,260
51.	Other Possessions	0.2896	183,104
			78,076,854

From the above table it follows that the largest proportion of the exports of the United Kingdom were sent to the United States of America. Between 1842 and 1853 the exports to that country increased from 3,528,807*l.* to 23,658,427*l.* Next in importance are the East Indies, which between the same dates increased from 6,023,192*l.* to 7,352,907*l.*; but they had decreased in 1848 to 5,077,247*l.* The Hanse Towns, being the outports of Germany, take nearly 9 per cent. of the whole British exports, while Holland and Australia stood nearly equal. But the exports to Australia in 1853 were 14,506,532*l.*, or 14½ per cent. of the whole exports, which amounted to 98,933,781*l.* In 1844 the exports to that country amounted to 791,993*l.* The British exports to Turkey were double those to Russia. It appears also that 70 per cent. of the exports from the United Kingdom are distributed among eleven countries, and 30 per cent. among forty to fifty countries.

The principal articles of British and Irish produce exported from the United Kingdom consisted in cotton and cotton manufactures, the value of which in 1853 amounted to 32,709,385*l.*; iron and steel, 10,848,080*l.*; woollen manufactures and woollen yarn, 11,626,220*l.*; apparel and haberdashery, 6,923,190; and linen manufactures and linen yarn, 5,910,355*l.*

II.—THE UNITED STATES.

	COUNTRIES.	Proportional per centage exported to different countries.	Declared Value.
			£
1.	United Kingdom	54.7206	24,077,078
2.	France	11.3592	4,998,051
3.	Hanse Towns	3.2561	1,432,699
4.	Canada	3.1804	1,399,387
5.	Cuba	3.0859	1,357,823
6.	Belgium	1.9904	875,785
7.	British American Colonies	1.7954	789,987
8.	British West Indies	1.6894	748,351
9.	Spain	1.5908	699,950
10.	Brazil	1.4315	629,883
11.	Trieste and Austrian Ports	1.2942	569,462
12.	China	1.2611	554,911
13.	Holland	1.1825	520,318
14.	Chili	1.1075	487,319
15.	Mexico	1.0818	476,026
16.	Italy	0.8187	360,248
17.	Hayti	0.8138	358,104
18.	New Granada	0.7176	315,790
19.	South Seas	0.5900	259,612
20.	Russia	0.5683	250,100
21.	Spanish West Indies	0.4995	219,813
22.	Danish ditto	0.4408	193,986
23.	Sardinia	0.3842	169,061
24.	Argentine Republic	0.3783	166,482
25.	Venezuela	0.3756	165,294
26.	British Guiana	0.3600	158,472
27.	Sweden and Norway	0.3589	157,952
28.	British East Indies	0.2862	125,937
29.	Central America	0.2242	98,649
30.	British Honduras	0.1714	75,431
31.	Peru	0.1684	74,133
32.	South America	0.1578	69,459
33.	Dutch East Indies	0.1535	67,537
34.	Dutch West Indies	0.1503	66,134
35.	Turkey	0.1497	65,874
36.	Gibraltar	0.1318	58,012
37.	Portugal	0.1127	49,612
38.	Cape of Good Hope	0.1068	47,073
39.	Manilla and Philippine Islands	0.1049	46,191
40.	Bolivia	0.0997	43,896
41.	Australia	0.0986	43,388
42.	Cisplatine Republic	0.0914	40,223
43.	Denmark	0.0547	24,094
44.	Malta	0.0536	23,608
45.	Madeira	0.0451	19,877
46.	Prussia	0.0442	19,455
47.	Swedish West Indies	0.0439	19,332
48.	Dutch Guiana	0.0431	19,007
49.	West Indies generally	0.0341	15,043
50.	Sicily	0.0315	13,862
51.	French Guiana	0.0312	13,755
52.	Cape De Verde Island	0.0303	13,349
53.	Other Countries	0.3044	133,951
			43,678,826

The exports of the United States are divided into—the produce of the sea, the forest, agriculture, and manufacture; and they were mostly directed to the United Kingdom, in the proportion of 60 per cent. of the whole; and to France, about 11 per cent.

The value of the produce of the fisheries exported in the year ending June 30, 1852, amounted to 475,487*l.*; that of the forest, including woods of all kinds, skins, &c., to 1,450,760*l.*; and that of agriculture, 1,317,380*l.*; the products of animals, 4,143,000*l.*; vegetable food, 2,090,000*l.*; tobacco, 18,316,000*l.*; cotton goods, 1,600,000*l.*; gold and silver coin, 7,800,000*l.*

III.—FRANCE.

	COUNTRIES.	Proportional per centage exported to different countries.	Declared Value.
			£
1.	United Kingdom	20.4427	10,016,832
2.	United States	13.2996	6,516,830
3.	Belgium	9.9244	4,862,959
4.	Algeria	8.4401	4,135,660
5.	Sardinian States	5.8855	2,883,907
6.	Spain	5.3164	2,605,074
7.	Switzerland	4.7875	2,345,922
8.	German Union	3.4704	1,700,498
9.	Brazil	2.4897	1,219,994
10.	Martinique	2.0483	1,003,700
11.	Turkey	1.6863	826,298
12.	Guadaloupe	1.6695	818,082
13.	Bourbon	1.4978	733,931
14.	Peru	1.4954	732,749
15.	Tuscany	1.2867	630,524
16.	Spanish West Indies	1.2579	616,417
17.	Two Sicilies	1.2502	612,598
18.	Holland	1.2359	605,606
19.	Chili	1.2164	596,081
20.	Mexico	1.1924	584,304
21.	Rio de la Plata	1.1362	556,750
22.	Hanse Towns	1.0506	514,842
23.	Russia, Baltic, and White Sea	0.9484	464,726
24.	Uruguay	0.7563	370,597
25	Senegal	0.6807	333,546
26.	Hayti	0.5402	264,701
27.	Danish West Indies	0.4951	242,600
28.	Egypt	0.4781	234,305
29.	St. Pierre and French Fisheries	0.4726	231,618
30.	Cape of Good Hope	0.4278	209,628
31.	Venezuela	0.4106	201,239
32.	Austria and Lombardo-Venetian Kingdom	0.4037	197,819
33.	Portugal	0.3377	165,509
34.	French Guiana	0.3229	158,231
35.	Barbary States	0.3131	153,454
36.	British East Indies, and New South Wales	0.2924	143,281
37.	Roman States, Lucca	0.2867	140,502
38.	New Granada	0.2713	132,951
39.	Russia, Black Sea	0.2045	100,217
40.	Norway	0.1540	75,496
41.	Greece	0.1406	68,924
42.	West Coast, exclusive of Senegal	0.1231	60,340
43.	Denmark	0.0994	48,746
44.	Sweden	0.0770	35,575
45.	West Indies, British	0.0745	34,504
46.	Guatemala	0.0691	33,901
47.	Dutch East Indies	0.0546	26,762
48.	Hanover	0.0420	20,618
49.	French Possessions in India	0.0394	19,336
50.	St. Marie de Madagascar	0.0222	10,915
51.	China, Cochin China, and South Sea Islands	0.0163	7,990
52.	Equator	0.0135	6,641
53.	Philippine Islands	0.0101	4,968
54.	Bolivia	0.0100	4,938
55.	Mecklenburg Schwerin	0.0093	4,564
56.	Other parts of Africa, including Madagascar	0.0062	3,091
57.	Dutch West Indies	0.0034	1,709
			49,333,500

The exports from France in 1853 amounted to 54,520,000*l.* of French produce, and 20,120,000*l.* of foreign produce.

CHAPTER II.

INTERNATIONAL COMMERCIAL LAW.

21. The most essential characteristics of commerce are its elasticity and expansiveness. It is founded on mutual wants, and stimulated by individual interest. Trading, being a necessary result of a state of society and of the institution of property, it becomes a right, consistent with the law of nature and acknowledged by the law of nations. Yet it is not a perfect right: a person cannot be forced to purchase or to sell against his will, although he has a right to purchase or to sell at his pleasure. It is the same with nations as with individuals. A nation, considered as a moral person, has a right to permit or prohibit the import and export of merchandise, or to hinder it by taxation, either for purposes of finance or for protection; but it has not a right to compel another State to receive its commodities, and give others in exchange: at the same time no nation has a right to exclude the whole merchandise of one single country, except in case of war. The security of merchants and navigators, and the facilities of commercial transactions, are the objects of treaties of commerce; whilst the rights of a nation to impose restrictions on commerce are within the province of the Law of Nations. The expediency of such restrictions, as a measure of public policy, is a question for political economy to resolve.

22. Many are the causes which occasion the importation

of articles from foreign countries. It may be because they cannot be produced at home, or because other nations can produce them cheaper. By international exchanges the physical incapacities of one country are met by corresponding advantages in others, and thus the productive forces of the world are most efficiently developed. Yet, owing to erroneous doctrines of political economy, the natural course of commerce has been obstructed by legislative interference: restraints and encouragements were given to importation and exportation, with a view to the attainment of a favourable balance of Trade. This fallacious doctrine, founded on the notion that wealth consisted in gold and silver, regarded any excess of imports above exports to be tantamount to a diminution of so much wealth as was required to be sent abroad for payment in gold: and so conversely. Adam Smith exploded this doctrine of the commercial system, and thenceforth the principles of commerce were put on a firmer foundation.

23. Another object sought by these restrictions was the protection of native industry, by granting monopolies to home produce or manufactures: so that the advantage of a class or of individuals was secured at the expense of the privileges of the masses. Such restrictions were also conceded in order to foster any particular trade or industry. Thus the Navigation Laws gave to the shipping interest an extensive monopoly, with a view to the maintenance of the naval power of the country. The Corn Laws were enacted to protect the British grower against the competition of foreign grain. But high duties discourage importation; prices run high, and labour becomes scarce, as the power of consumption diminishes. Customs duties are not of recent invention. The Romans resorted to restrictions and prohibitions, and this was the case also in the middle ages, but simply as a means of revenue: as such they are not altogether objectionable. When native industry is subjected to heavy taxation, foreign merchandise may reasonably be put on an equal footing. By the commercial reforms inaugurated by Sir Robert Peel, and sedulously maintained by Lord John Russell, the principle of protection, in

the commercial legislation of the United Kingdom, was altogether abandoned, and, by a series of provident measures, unlimited freedom was allowed to British commerce. In other countries the protective system has not yet been relaxed; but a more enlightened policy is gradually being introduced.

24. In the United States of America, customs duties are raised almost exclusively for protection. After manifold attempts to bolster up the manufacturing interests of the country by artificial support, a more liberal tariff was introduced in 1846, and in 1853 it was proposed to admit all the raw materials of manufacture duty free: which, however, has not yet passed into law. France has long been the victim of the protective system. With a view of becoming independent of foreign produce, she resorted to the expedient of imposing heavy import duties; she refused to receive British iron, because the forest proprietors would feel the effect of competition; but by her restrictive system she inflicted also irreparable injury upon her export trade. Some important steps have recently been taken by the French Government to remove the restrictions which have shackled the industry and impeded the material progress of France.

25. Besides the import and export duties, there are others especially affecting navigation, the object of which is to charge merchant vessels with the expenses of repairing light-houses and landmarks, or for services given in sea-ports to the profit of foreigners as well as natives. In some countries duties are also imposed on articles *in transitu*, as there is no obligation on a sovereign to admit the entrance of foreign merchandise into his territory. The warehousing system of the United Kingdom affords the greatest advantage to foreign commerce, by allowing articles to be imported and lodged in public warehouses, at a moderate rent, without paying duties until they are entered for consumption, and when not so entered, to be re-exported without paying any duties.[1]

[1] 16 and 17 Vict. c. 107, § 58.

26. The sovereign rights of a nation do not extend beyond its own territory. The limits of territory on land are prescribed by treaties; the maritime territory extends to the ports, harbours, bays, mouths of large rivers, and adjacent parts of the sea enclosed by headlands, belonging to the same State, as far as a cannon-shot from the shore, along all the coasts of the State. The coasts include the natural appendages of the territory which rise out of the water, to the distance of about three miles from the shore. Sometimes, for domestic purposes and particularly for fiscal or defensive regulations, large territorial jurisdiction has been asserted.[1] Such are the *Hovering* Laws of the United Kingdom and of the United States, which assumed a jurisdiction of four leagues from the coasts. The sea, the common highway of nations, out of reach of cannon-shot, is of universal use.[2] Rivers flowing through adjacent States, are presumed to be of common use to the different States: this was specially admitted by the Treaty of Vienna, of 1815, with respect to the great European Rivers. And the right of the common use of the waters will include the right of the shores, for the purposes necessary to the navigation of the river. So in respect to fishery, Lord Mansfield said, "In rivers not navigable the proprietors of the land have the right of fishing on their respective sides, but on navigable rivers the proprietors of the land on each side have it not, the fishery is common; it is *primâ facie* in the king, and is public."[3] Yet in both the sea and rivers there may, by legal possibility, exist a peculiar property, excluding the universal or common use. Portions of the sea are claimed in virtue of long custom; so are rivers flowing through contiguous States. The banks on one side may have been first settled, by which the possession and property may have

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[1] 1 Wheaton, p. 218; 9 Geo. II. c. 5. Le Louis, 2 Dods. 247.

[2] The Roman Law held common to mankind—the air, running waters, the sea, and even the shores of the sea. Grotius, in his "Mare Liberum," vindicated the freedom and community of the sea, and Selden, in his "Mare Clausum," powerfully maintained the contrary.

[3] Instit. lib. xi. tit. i. § 2. Carter *v.* Mureot, 4 Burr. 2162.

been acquired, or cessions may have taken place upon conquests or other events. But the general presumption bears strongly against such exclusive rights, and the title is a matter to be established on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated by clear and competent evidence.[1] Claims upon portions of the sea, founded upon prescription or long custom, have been asserted by different nations. The Republic of Venice claimed the sovereignty of the Adriatic, and Great Britain claimed sovereignty over the narrow seas; but such sovereignty has never been acknowledged. Roads, bays, and straits of small extent, are capable of possession; but not those which comprise great tracts of sea, such as Hudson's Bay and the Straits of Magellan, over which no empire or right of property can extend. When a strait serves as a communication between two seas, the navigation of which is common to all, such as the Sound which connects the Baltic with the German Ocean, the country which commands the pass may impose certain duties, on account of the trouble and expense connected with its protection. A regular tariff of the Sound dues was subscribed in 1841, by Danish, British, and Swedish-Norwegian commissioners.[2]

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[1] Per Lord Stowell, The Twee Gebroeders, 3 Rob. 339; Phillimore's International Law, vol. i. p. 171.

[2] See McCulloch's Dictionary, "Elsineur."

CHAPTER III.

NATURE, SPIRIT, AND HISTORY OF COMMERCIAL LAW.

27. The Lex Mercatoria, or Merchant Law, of any particular country, has been defined to be a system of principles or rules peculiarly regulating mercantile transactions, derived principally from the customs of merchants in different nations; from the usages, either general or local of the merchants, which have been judicially sanctioned; and, lastly, from express legislative enactments. Commercial Law is also a branch of the civil law. It comprises the respective and relative rights of individuals in regard to their mercantile transactions. And it is a branch of the law of nations, inasmuch as its chief provisions apply to merchants, natives as well as foreigners, and involve international questions both between nations and nations, and between individuals of different countries. Mr. Justice Duer, in his Treatise on Insurance, said, "The Law Merchant resembles the Law of Nations, properly so called, in the sources whence it is chiefly derived, the rules of natural equity and justice, and its general adoption by civilized Powers, but differs from it widely in the nature of the obligation which it imposes, and of the sanction by which it is enforced." The Law of Nations is binding on States by treaties, international equity, and the tacit acknowledgment of rights; the Law Merchant is binding, because most of its provisions are derived from natural law, which is the supreme, invariable, and uncontrollable rule of conduct to all men.

Therefore it is that Commercial Law partakes less than any other branch of law, of the influences of local circumstances, and is susceptible of general acceptance and application. The judicial decisions of England, founded on general principles, and proceeding on extended views of commercial usage and expediency, are held as authorities in Scotland, and *vice versâ;* and so the American decisions are now received in the British Courts as authorities, and *vice versâ*. Such is the nature and spirit of commercial law. "The merchants of all nations form a single society, and have one single language common to all." It is to this branch of law that Lord Mansfield applied, with great propriety, the noble aphorism of Cicero, when speaking of the eternal law of justice: *Nec erit alia lex Româ alia Athenis; alia nunc, alia posthac; sed et omnes gentes et omni tempore una lex et sempiterna, et immutabilis continebit.*[1]

28. The Law Merchant is a peculiar system, which prevailed in England throughout the whole of the Anglo-Saxon times; it was especially recognised in the time of Edward III.: when the staple was ordained, a mayor was to be chosen, in each town, skilled in the *Law Merchant*, to do right to every man according to that law.[2] The modern Law Merchant is composed of three distinct elements; viz. the customs of merchants, the ordinances of foreign States, and the Statute Law. As art precedes science, so custom precedes law. Long are these customs practised before they are committed to writing. But though not written or declared by the legislative power, they acquire all the authority of law, and are gradually engrafted upon the common law of the country. The customs of merchants are part of the law of England. Judicial determinations settle what is the custom of merchants, and they become the Lex Mercatoria as to the different questions.[3] In order that a custom be binding, it

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[1] Frag. de Repub. lib. iii. Luke *v.* Lyde, 2 Burr. 882.

[2] 4 Inst. 237, Spence, Eq. Juris. vol. i. p. 247.

[3] Edie *v.* E. India Comp. 2 Burr. 1228.

must be either the usage of the whole mercantile world, or of a particular trade universally known as such. An usage of a particular place, or of a particular class of persons, would not be binding on other persons, unless these were acquainted with those usages and adopted them.[1] In all cases, however, no custom can be set against an express Act of Parliament.[2]

29. Besides the customs of trade, another source of commercial laws are the ordinances of foreign States, which constitute the body of maritime laws of nations. These stand, with respect to the Law Merchant of this country, in the same relation as the Civil or Canon Law. They have not the force of law or enactment, nor any state authority, but possess the authority due to reason and common sense, sanctioned by custom. Indeed, some of the best principles of our mercantile jurisprudence were imported from foreign countries, where commerce was of much earlier growth. The rules of the *Consolato del Mare* are to this day the foundation of our maritime law; and the celebrated Lord Mansfield did not consider it derogatory to the honour of British jurisprudence to borrow whatever was good, either from the Civil Law, the Law of Nations, or the Maritime Law of any country with which he was conversant. The Law of Marine Insurance, especially, is almost entirely derived from foreign sources. Mr. Justice Story, commenting on the Growth of the Commercial Law,[3] said, "It is most manifest that the English law, working as it does into the business of a nation crowded with commerce and manufactures, must for ever be in search of equitable principles, to be applied to the new combinations of circumstances which are daily springing up to perplex its courts. In adopting new rules, it is indispensable to look to public convenience, mutual equities, the course of trade, and even foreign intercourse. It is plain that in such inquiries the customary and positive law of foreign

[1] Blackett *v.* Royal Exchange Assurance Comp. 2 C. & J. 250.

[2] Noble *v.* Durell, 3 T. R. 271.

[3] Story's Miscellaneous Writings, p. 279.

countries, as the result of extensive experience, must be of great utility. No nation can be so vain as to imagine that she possesses all wisdom and all excellence. No civilized nation is so humble that her usages, laws, and regulations do not present many things for instruction, and some for imitation."

30. The last source of the Commercial Law of the United Kingdom is the Statute Law. The Law on Joint Stock Companies and Banking, Navigation Law, and Bankruptcy, are almost exclusively regulated by statutes. It is to be regretted that the statute law of the United Kingdom is wanting in system, brevity, and clearness. The number of Public General Acts in the Statute Book, down to the close of the 16th and 17th Vic. was given by the Statute Law Commission as 16,579, mixed up with 9,285 Local and Personal Acts, and 14,268 Private Acts; of the public acts only 2,509 were in force in 1853, relating some to the United Kingdom generally, others exclusively to England, others to Great Britain, and some few to England and Ireland. The defects of the statute law arose from the promiscuousness of the subjects of the statutes, and from the only partial repeal of statutes by new legislation. The differences of the laws of the United Kingdom, especially those existing between the laws of England and Scotland, are found productive of much inconvenience, in the extended relations between the two countries. Scotland was, by the Act of Union, declared, from the 1st May, 1707, united to England. By that union the two countries entered into a communion of all rights, privileges, and advantages belonging to the subjects of either country; but with respect to the law then in force in Scotland, or which would thenceforth be enacted for the United Kingdom, it was provided by the 18th article, that the former should remain in the same force as before, but alterable by Parliament; and further, that the laws concerning public right, policy, and civil government may be made the same throughout the United Kingdom; but that no alteration be made in the laws that govern private rights, except for the evident utility of the subjects within Scotland:

consequently the municipal law of England is not in force in Scotland, and *vice versâ*. In June 1853, in consequence of a Conference of Deputies from all the Chambers of Commerce, and other Mercantile and Legal Associations in England, Ireland, and Scotland, a Royal Commission was issued, to consider the best mode of assimilating the Mercantile Law of the United Kingdom. The Colonies of the British Empire are subject to the common law of England, a certain part of the statutes of England, and the enactments of their own legislature; except that British Guiana, which was capitulated to the English by the Dutch, is governed by the Dutch law; Trinidad, surrendered by the Spaniards, retains the Spanish law; St. Lucia, taken from the French, the Canadas, and Mauritius, have the French law; the Cape of Good Hope, and Ceylon, the Roman Dutch law.

31. The history of Commercial Law has already been traced, in the brief sketch of the progress of commerce. The ancients left us but small fragments of their commercial legislation; the laws of the Athenians are but incidentally quoted by their classics, Demosthenes, Æschines, Thucydides, &c.; and the only relic we possess are the brief but invaluable maritime laws of the Rhodians, which were subsequently incorporated into the Roman law.[1] Of the maritime law of the Romans no general code was formed, but the Digest contains some material principles and provisions relative to maritime rights. At the eve of the impending ruin of that colossal empire, and whilst the scene of internal discord and external usurpation, Justinian constructed the noble fabric of Roman jurisprudence. The exquisite perception of moral duties, and the comprehensiveness and depth of learning of

[1] A case having been submitted to the decision of Antoninus Pius, the following was his rescript: "The earth is subject to my dominion; the sea to that of the law. Let the case be determined by the Rhodian Law on Naval Affairs, the provisions of which I direct to be observed in future in all cases where they are not repugnant to the laws of Rome. The same decision was formerly made by Divine Augustus." (Dig. lib. xiv. tit. ii. 1, 9.) Duer on Insurance, vol. i. p. 25.

the Roman jurists, had for centuries reflected the greatest lustre on that empire; but the Roman laws and usages, added to the numerous Eastern codes, had grown to an enormous extent, and it was only when they were embodied into a complete code, that these precious materials exhibited their priceless value.

32. The body of general maritime law dates, it is true, from the middle ages, when the Mediterranean States first rose into commercial importance; but it must not be forgotten that the revival of the Roman law, by the labours of its learned commentators, caused an enlarged familiarity with the principles of natural equity; and it is owing to the introduction of these in the Maritime Ordinances that they acquired the character of "jus maritimum universale." Of these, the Amalphitan Table, compiled in Italy towards the end of the eleventh century, is perhaps the earliest. But the most complete collection of Sea Laws, as venerable for its antiquity as wonderful for the wisdom of its provisions, is the Consolato del Mare. It is a production which in vain exercised the ingenuity and defeated the researches of learned jurists to ascertain the time of its publication, the name of its author, and the authority which it carried. From the conflicting opinions advanced on the subject, the Consolato seems to have been published at Barcelona, towards the end of the thirteenth century, and in the Catalonian dialect; but the honour of its compilation is claimed, with equal learning and argument, by Italy, Spain, and France.[1] The Consolato contains doctrines on the ownership, building, and equipment of ships,—the duties and authorities of the owner, master, and mariners,—the earning, payment, and loss of freight and wages,—and also on average jettisons and captures. Since the publication of the Consolato, other ordinances emanated in the north-western coasts

[1] Although such is the conclusion arrived at by the learned researches of Pardessus, and subsequently strengthened by Mr. Reddie, the title of the Consolato is ITALIAN, and its associations point out ITALY as its birthplace. Azuni vindicates the claim of Pisa to it, and his reasonings would establish the eleventh century as the date of its publication.

of Europe, such as the Guidon de la Mer, afterward included in the Us et Coûtumes de la Mer, by the learned Cleirac, in 1667; the Rôles d'Oléron, the Usages de Damme, and the Ordinances of the Hanseatic League. But the publication of the famous French ordinance of 1681, first gave completeness and system to the maritime law of Europe. In England, except a short abridgment of the Sea Laws of foreign countries, by Welwood, the first work on Commercial Law was Malyne's Lex Mercatoria, in 1622; and no other work of importance appeared till Molloy published his work, De Jure Maritimo et Navali, fifty years after. A singular instance of the tardy progress of commercial law in England may be produced. Notwithstanding that promissory notes had been introduced into this country for thirty years, their negotiability was stubbornly denied. It is recorded that Lord Holt, giving judgment in the case of Buller v. Crisp,[1] said, "I remember when actions upon inland bills did first begin, and then they laid a particular custom between London and Bristol." The defendant's counsel would put them to prove the custom, at which Chief Justice Hale "laughed," and said, "*they had a hopeful case of it.*" Afterward, by the statute of Anne, promissory notes were put on the same footing as bills of exchange. Lord Holt, in his famous decision in Cogg v. Bernard,[2] introduced the whole of the doctrines of the Civil Law of Bailment in the English mercantile law.

33. But it is to Lord Mansfield that we are indebted for the sudden development of this branch of science. The judicial decisions of this eminent judge, characterized by a thorough acquaintance with the learning and commercial experience of other nations, and replete with maxims of the most scrupulous morality, introduced a new era in the annals of British jurisprudence. Chief Justice Buller, describing the change which was produced in the commercial law of England since the accession of Lord Mansfield, said, "Before

[1] 6 Mod. Rep. 29.

[2] 2 Lord Raymond, 917.

that period we find that in courts of law all the evidence in mercantile cases was thrown together, they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find out some certain general principles which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard those principles stated, reasoned upon, enlarged and explained, till we have been lost in admiration at the strength and stretch of the human understanding."[1] Contemporary with this eminent judge were Pothier and Emerigon, who enriched the world with the masterly products of their genius and research. During the European conflict consequent on the French Revolution, the eminent Lord Stowell presided over the English Court of Prizes. The principles of international jurisprudence,—first expounded by Gentilis, systematized by the illustrious Grotius and Puffendorf, and rendered both popular and attractive by the methodic treatises of Vattel, and the learned labours of Sir James Mackintosh,—received at the hand of Lord Stowell most practical application. In the words of Mr. Justice Story, "With him the grave learning of Grotius, the acute, bold, and somewhat vehement discussions of Bynkershoek, the reverend testimonies of the Consolato del Mare, the collections of Cleirac, the busy, practical sense of Roccus, the brief but clear text of Heineccius, the various and exhausting labours of Casaregis, the argumentative commentaries and luminous treatises of French jurists, appear as perfectly familiar as the writers of his own age and country."

34. Whilst this eminent judge established the great principles of international equity in the British tribunals, Napoleon applied his genius and energy to the codification of the law—a work which reflected so much honour on French jurisprudence. The five codes succeeded each other with wonderful rapidity, and they inaugurated a new era in

[1] Likbarrow *v.* Mason, 2 T. R. 631. 1 Smith's Lead. Cases, 388.

the science of law. Codification acquired universal ascendency, and almost all the Continental States soon after enacted new codes, which were mostly based on the French model. The American law, like the law of England, has not been digested into a code. Its illustrious commentators, Kent and Story, are the chief ornaments of American Jurisprudence. In the United Kingdom, numerous treatises on the several branches of the law, and the periodical Digests of the principal decisions of all the Courts of Common Law,—supply the want of a complete code. Measures are, however, in progress towards the consolidation of the law, and we may indulge in the hope that efforts will be made for the attainment of what would prove an inestimable boon to the mercantile world—a complete Code of Commercial Law, stripped of all useless technicality, and such as may be adopted, in the same manner as the Pandect of Justinian, or the Code Napoléon, by all commercial nations.

35. The multiplicity of laws which govern the mercantile transactions of the world, and the differences which prevail in their principles, and in the modes of procedure, are the sources of much ignorance and uncertainty, often producing serious obstructions to the progress and security of commerce. Considerable benefit would therefore accrue from a general assimilation of the laws relating to merchants, partnership, bills of exchange, insurance, bankruptcy, &c., whereby merchants trading with all countries may know that the same rights and obligations, with respect to their mercantile transactions in force in their own country, are held and respected everywhere. This assimilation may be effected by the formation of an International Code of Commercial Law, or by gradual reforms being introduced in any country on any branches of the law, with a view to the attainment of uniformity with the general law on the subject as it prevails in other countries. Owing to the extension of communication and intercourse among nations, the formation of associations for public undertakings with capital belonging to different countries, and the rapid development of commerce,

questions of international mercantile jurisprudence are more frequent and of difficult solution. To attain even a partial uniformity in the commercial legislation of all countries must necessarily be the work of time; yet the progress of the science of law, combined with those elements in operation which daily lessen the barriers now separating countries providentially destined to unite in their efforts for their physical and moral advancement; and, above all, the increasing want which will be experienced of such an assimilation, in proportion as the relations of commerce increase between any two countries, will operate in accelerating the realization of the noble undertaking—the formation of one Code of Commercial Law, sanctioned by all countries, and held as the sacred bond of society between all families of the earth.[1]

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[1] It is gratifying to the author to note, that the enunciation of these views in his larger work, entitled "Commercial Law of the World," was followed by the issuing of a Royal Commission, and by some legislative measures for the assimilation of the mercantile laws of the United Kingdom. At the Statistical Congress of official deputies and learned individuals from twenty-six States, held at Brussels, in September 1853, a resolution was passed, expressing a hope that the great differences now existing in the commercial legislation of different countries may be diminished, and even removed altogether.

BOOK II.

RESTRAINTS OF TRADE.

36. In considering the nature and principles of commerce, it has been observed that although it is founded on unlimited freedom, there are obstructions to its expansion, resulting from the right of States to impose duties for purposes of revenue, or for protection. To these obstructions we must now add the restraints which affect individuals; as when a person, for a consideration, foregoes his right to trade in a certain locality; and those which proceed from personal disqualifications, from legislative enactments, and from customs of trade. Personal disqualifications are the result either of the possession of a character which does not admit the concurrence of the mercantile profession, of the nationality of the merchant, or of his being incapacitated on account of age or condition. Legislative enactments may restrain trade by granting privileges, monopolies, patents, and copyright, and also by imposing excise duties. Restraints of trade by customs or bye-laws are void by statute, except the customs of the city of London. Commerce is also restrained in time of war, when all maritime countries assume the new character of belligerents or neutrals, and some of their merchandises are characterised as contraband of war. After the consideration of those restrictions which affect trading, in time of peace and in time of war, we shall enter into the examination of mercantile contracts in their relation to partnership and agency, mercantile instruments and mercantile property.

CHAPTER I.

OF MERCHANTS.

Section I.—DEFINITION OF MERCHANT.

37. A MERCHANT[1] is one who exercises the mercantile profession, and who intentionally and habitually deals as such. All persons who, either for themselves or as agents for others, seek their living by buying and selling, or by buying and selling for hire, or by the workmanship of goods and commodities; all shipowners, warehousemen, and insurance brokers, and all persons dealing by wholesale or by retail, are traders under the jurisdiction of the Bankrupt Law.[2] There is a difference between a transaction for private purposes and one for purposes of commerce. The purchase of provisions for one's own use is not trading; but the purchase of an article with a view to re-sell it, that is trading. Certain operations are commercial in themselves—such as banking, exchanges, shipping. For example, a person, not a trader, by drawing a bill of exchange, would become a trader with respect to that transaction.[3]

38. Every man may be a trader unless personally disqualified. This sound principle of the common law was interfered with by the Statute of Apprenticeship, whereby no man could exercise any trade or craft except he had served seven years as apprentice.[4] The Courts of law, however,

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[1] The word "merchant" means one who traffics to remote countries; and "trader," one who engages in merchandise. "Many traders will necessitate merchants to trade for less profit, and consequently be more frugal."—JOHNSON. Commerce is divided into Home trade and Foreign trade.

[2] Bankrupt Consolidation Act, 12 and 13 Vict. c. 106, § lxv.

[3] Com. Dig. Merchant.

[4] 5 Eliz. c. 4.

being adverse to the spirit of this statute, limited materially its application, and at last it was entirely repealed.[1] The privilege of trading, one of the most sacred principles of British jurisprudence, is jealously secured by law; and no person may bind himself not to employ his talent, his industry, or his capital, in any useful undertaking in the kingdom—such voluntary restraint being considered illegal and void.[2]

Section II.—RESTRAINTS BY OBLIGATIONS NOT TO TRADE.

39. There are, however, circumstances under which a person may agree to a partial restraint of trade for a valuable consideration; and such an agreement would be good or bad, according as the protection from opposition is necessary for the *bonâ fide* purposes of the business.[3] But where the restraint is longer and wider than the protection of the party with whom the contract is made can possibly require, such restraint would be considered unreasonable in law, and the contract which would enforce it would be held void.[4] For example, an agreement between a druggist and his assistant, by which the latter bound himself not to exercise at any time thereafter the trade of chemist and druggist, *in the town of Taunton, or within three miles thereof*, under a penalty of 500*l.*, was held valid, notwithstanding the restriction was infinite as to duration.[5] An agreement between a surgeon-dentist and his assistant for four years, the dentist engaging to instruct him in the business, on condition that after the expiration of the term the assistant should not carry on that business *in London*, was considered reasonable, and not invalid.[6] Two parties, having been partners as publishers of books, on dissolution of partnership agreed that one of them should retain the whole of the partnership stock, and should indemnify the

[1] 54 Geo. III. c. 96, § 1.
[2] Mitchel *v.* Reynolds, 1 Smith's Lead. Cases, 171.
[3] Tallis *v.* Tallis, 1 Ellis and Blackburn, 391.
[4] Hitchcock *v.* Coker, 6 A. and E. 446.
[5] Ibid.
[6] Mallan *v.* May, 11 M. and W. 653.

other against all liabilities, and pay him a large sum of money, provided the latter would not directly or indirectly be concerned in the canvassing trade, *in London, or within 150 miles of the General Post-office; nor in Dublin or Edinburgh, within fifty miles of either; nor in any towns in Great Britain or Ireland, in which the continuing partner or his successors might at the time have an establishment, or might have had one within the six months preceding.* The retiring partner having broken the agreement, an action was brought, and the restriction was not deemed unreasonable.[1] A trader may sell a secret in his business, and restrain himself generally from using it.[2]

Section III.—Rank and Professions Incompatible with Trading.

40. By the Roman law, nobles and dignitaries were prohibited from trading. No senator, or the father of a senator, could possess a ship above 300 amphoræ; but privileges were granted to merchants who imported provisions for the city.[3] By the Russian Swod,[4] nobles in the service of the empire cannot be admitted to the guilds. In France, by an edict of Louis XIV., noblemen were allowed to enter into partnership, and be interested in merchant vessels, produce, and manufactures, without losing on that account their titles to nobility, provided they did not sell by retail. In the United Kingdom, there are numerous instances of peers being elected from the mercantile profession, and of their continuing, after their elevation to the peerage, to be interested in trade.

41. One of the Professions inconsistent with the responsibilities and cares of a merchant is the military: soldiers were prohibited by the Roman law from engaging in trade, and are now prohibited by the Russian Swod. By the ecclesiastical law, the clergy cannot engage in trade. The same

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[1] Tallis *v.* Tallis, 1 Ellis and Blackburn, 391.

[2] Bryson *v.* Whitehead, 1 Sim. & Stu. 74.

[3] See Dr. Taylor's Summary of the Roman Law.

[4] Russian Swod, Tit. Merchant, 14.

prohibition was adopted by the French law; but it has not been introduced into the civil code. In Spain and Russia, ecclesiastics cannot trade; nor in the United Kingdom: except that, by a recent statute,[1] they may be members of joint-stock companies. There are other professions with which trading could not be associated, such as magistrates, judges, public functionaries, officers of customs, or members of the legal profession. In France, brokers cannot trade on their own account. It may be remarked, that whilst such individuals are prohibited from trading, they are not the less bound by their own engagements in trade. Their possessing a rank or profession incompatible with trading does not produce any personal incapacity, and such parties would be subjected for their acts of trade to the jurisdiction of commercial tribunals, or other regular courts of justice.

Section IV.—NATIONAL CHARACTER OF THE MERCHANT.

42. Every person born in the British dominions, or of a British mother, is a British subject. The children of foreign subjects, born in the British dominions, are British subjects. A person has a right of nationality by birth, and may acquire it by naturalization. The domicile of birth or of origin is retained until the party hath abandoned it, and hath acquired another as his sole domicile.[2] The domicile of choice is that which a person himself establishes. In time of war, the domicile or national character of the merchant, of goods, and of ships, becomes a matter of serious investigation. If a person goes into another country, and engages in trade, and resides there, he is by the law of nations considered as a merchant of that country.[3] A person will acquire the national character of the place where he resides, when the purposes for which he went to the country, the time he has resided or intended to reside there, the extent of business,

[1] 1 and 2 Vict. c. 106, §§ 29—31.

[2] Dalhousie *v.* McDouall, 7 Cl. and Finl. 817.

[3] Per Lord Stowell, The Indian Chief, 3 Rob. 18. Phillimore on Domicile, § ccix.

or the familiar ties which he may have formed, are sufficient to establish his domicile there. "Questions of residence or domicile," said the learned Lord Stowell,[1] "are questions of considerable difficulty, depending on a great variety of circumstances, hardly capable of being defined by any general precise rules. The active spirit of commerce now abroad in the world still further increases the difficulty, by increasing the variety of local situations in which the same individual is to be found at no great distance of time, and by that sort of extended circulation, by which the same transaction communicates with different countries. Time is the grand ingredient in constituting domicile. If a person goes to a place only for a special purpose,—if the purpose be of a nature that may probably, or does actually, detain the person for a great length of time,—a general residence might grow upon the special purpose. At the same time, though a person may have resided in a place for only a short period, if he had arrived there with the intention of permanent residence, that would be sufficient.[2]

43. A national character, with respect to certain transactions, may be acquired even without permanently residing at the place. A man may have mercantile concerns in two countries; and if he acts as a merchant in both, he might be considered as a subject of both, with regard to the transactions originating respectively in those countries. A counting-house or fixed establishment is not essential to constitute a man a merchant of any place; if he is there himself, and acts as a merchant of that place, it is sufficient.[3] A person may reside in a neutral country, and trade in the hostile; or he may have connexions, and be a partner, in a house of trade in the enemy's country. In that case, the transactions originating with the house in the enemy's country would be hostile, and those arising out of his other trade would be exonerated.[4] A merchant will be deemed to reside in a country so long as he remains there. A mere intention to remove is not suf-

[1] The Harmony, 2 Rob. 322.
[2] The Diana, 5 Rob. 60.
[3] The Jonge Klassina, 5 Rob. 303.
[4] The Portland, 3 Rob. 41.

ficient without some overt act, some solid fact, showing that the party is in the act of withdrawing.[1] The character of consul would not protect that of merchant, united in the same person. A consul residing in a country, and trading there, would be deemed a subject of that country. In Eastern countries, Europeans trading under the shelter and protection of some factory, or national association of merchants, are presumed to take their national character from that association under which they live and carry on their commerce.[2]

44. The national character of a ship is determined by the residence of the owner;[3] but if she navigates under the pass of a foreign country, she would be considered as bearing the national character of that nation under whose pass she sails.[4] So, if a ship were chartered to convey armed troops or officers in the military service of the enemy, she would acquire a hostile character.[5] The mariners are characterised from the national character of the country in whose service they are employed, and a master's national character is inferred from his employment.[6]

Section V.—FORMS AND EFFECTS OF FOREIGN CONTRACTS.

45. When orders are sent to foreign countries, the contracts, to be valid and obligatory, must be executed in certain prescribed forms, which vary according to the law in different places. It is often difficult to ascertain what law is to regulate the contract, and, when the contract is entered into in one place and executed in another, which law is to prevail. Much learning has been bestowed on this important subject. The first point to be determined is, where the contract is considered as concluded; and this is by no means of easy solution, especially where the contract is made by correspondence. Every agreement consists of a proposal on the one side, and assent on the other, and, until the terms of the contract are mutually and finally agreed upon, either party may retract. As a

[1] Munroe *v.* Douglas, 5 Mad. 379.
[2] The Indian Chief, 3 Rob. 32.
[3] The Vigilantia, 1 Rob. 13.
[4] The Vrow Elizabeth, 5 Rob. 2.
[5] The Orozembo, 6 Rob. 433.
[6] The Frederick, 5 Rob. 8.

general rule, the place in which the assent is given, is deemed the place where the contract is made. Suppose a merchant at Genoa, by letter or by agent, offers his goods to a merchant in London, at a certain price, and the latter agrees to purchase them at such price, the contract is deemed as made in London. If, however, the London merchant refused the goods at such a price, but offered to take them at a lower price, and the merchant at Genoa acceded to that offer, then the contract is deemed as concluded at Genoa.

46. If the contract be valid by the law of the place where it is made, the same is valid everywhere; except that no nation is bound to recognise contracts injurious to its interests or convenience, or founded on moral or political turpitude, although valid where they were made. So, *vice versâ*, a contract void or illegal where it is made, would be void and illegal everywhere.[1] Therefore, if a contract be rendered invalid by the want of the formalities or solemnities required by the law of the place where it is made, the contract would be invalid everywhere else.[2] This rule, however, relates to the nature, the obligation, and the interpretation of the contract. As, for example, in the case of a partnership: if, by the law of the place where the contract is made, partners would be liable *in solido*, although by the law of the domicile of the partnership they would only be liable for a proportionate share, the law of the former would follow the debt everywhere. Or, in other words, if a partner of an American house, with limited liability, makes a contract in England, where partners are liable to the whole extent of their property, he would become liable for the debt according to the law of England, unless the contract had been entered into according to the law of America.

47. While the construction of contracts is governed by the law of the place in which they are made, the remedy upon

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[1] Story, Conflict of Law, §§ 242, 243. Ibid. § 260. Ersk. Inst. b. iii. tit. 2, §§ 39—41, pp. 514, 515.

[2] Clegg *v.* Levy, 3 Camp. 166. Alves *v.* Hodgson, 7 T. R. 241. James *v.* Catherwood, 3 Dow. & Ry. 190.

them—such as the mode of suing, and the time of suing—must be pursued by such means as the law points out where the parties reside.[1] The *lex loci* acts upon the right, the *lex fori* upon the remedy. So it is a rule, that a debt contracted in a foreign country may be enforced wherever the debtor or his property may be found, and according to the law on debtor and creditor prevailing in that country. A Spaniard and a Portuguese had some mercantile transactions together in Portugal, by which the Portuguese became indebted to the Spaniard. They afterwards came to England, and the Spaniard caused the Portuguese to be arrested for the debt stated to have accrued in Portugal. The Portuguese produced evidence, showing that by the law of Portugal a debtor was not liable to arrest, and therefore he claimed to be discharged in this country. But Lord Tenterden decided that the Portuguese was not entitled to the relief sought. When a suit is instituted between parties in one country on a contract made in another, the remedy must be taken according to the *lex domicilii.*[2]

48. All questions of minority or majority, incapacity consequent on coverture, emancipation, and other personal qualities and disabilities, are governed by the *lex loci contractus*, or the law of the place where the contract is made or the act done.[3] Persons are presumed to contract by the law of the place where they reside, unless the contrary is shown. As a general rule, personal property follows the owner, and has no locality, whilst real property is governed by the law of the place where the property exists. With respect to foreign judgments subject to examination, they are ground of action everywhere, and cannot be questioned in the courts in this country; and to render a judgment void, on the ground that it is contrary to the law of the country where given, it must be shown clearly and unequivocally to be so.[4] England,

[1] Story, Conflict of Law, § 556. Ferguson *v.* Fyffe, 8 Cl. and Fin. 121. Gener. Steam Navig. Co. *v.* Guillou, 11 M. and W. 877.

[2] De la Vega *v.* Vianna, 1 B. and Ad. 284.

[3] Walker *v.* Witter. 1 Doug. 6, n. Martin *v.* Nicolls, 3 Sim. 44.

[4] Becquet *v.* Mac Carthy, 2 B. & Ad. 951. Rose *v.* Himley, 4 Cranch, 269.

Scotland, and Ireland, though forming one integral kingdom, are still foreign to each other with respect to their municipal laws; consequently, a judgment obtained by the courts of either country is not enforced by the courts of the other, and a new action needs be introduced. A Bill has been brought into the House of Commons to enable execution to issue in any part of the United Kingdom, under a judgment obtained in any court in England, Scotland, or Ireland.

Section VI.—ALIENS.

49. An alien is a person born out of the jurisdiction of the British dominions. Aliens are either friends or enemies, according as the country to which they belong is at peace or war with this country. An alien enemy is forbidden to trade, except by licence; but an alien friend possesses the same rights to trade as a native. A liberal policy is all but universally adopted with respect to aliens; all governments having experienced that the prosperity of a country is greatly promoted by the affluence of strangers, and by an unlimited extension of foreign commerce.

50. In the United Kingdom, by Magna Charta and subsequent statutes, merchants were allowed freedom to depart, come and carry, buy and sell, without any interruption, notwithstanding any charter or usages to the contrary. The last Statute[1] on Aliens establishes the right of aliens to take and hold, by purchase, gift, or bequest, every species of personal property; and also to take and hold any land, houses or other tenements, for the purpose of residence or of occupation, or for the purpose of business, for any time not exceeding twenty-one years, with the same rights, remedies, and privileges as if he were a natural-born subject, except the right to vote at elections for Members of Parliament. Aliens may become naturalized by obtaining a certificate from the Secretary of State for the Home Department, which grants them all the rights and capacities of a natural-born subject, except the capacity of

[1] 7 & 8 Vict. c. 66.

being a member of the Privy Council, or of either House of Parliament. The question whether a foreigner is entitled to copyright, and right to patent, in this country, will be considered under the respective heads on those subjects.

51. In the United States of America, aliens are, by common law, under the same disabilities as in England, with respect to real estate. But as after five years' residence they and their families are entitled to the benefit of naturalization, the rigorous and inhospitable doctrine of the common law is practically superseded.[1] An alien may, by becoming naturalized, be entitled to all the privileges of natural-born subjects; except that a residence of seven years is required to qualify an alien for a member of Congress, and that no person except a natural-born subject can be a governor of a State, or President of the United States. By special statutes of several States, viz. New York, Louisiana, Maryland, South Carolina, Delaware and Missouri, Pennsylvania, Kentucky, Virginia, Michigan, New Jersey, Illinois, Indiana, Ohio, North Carolina, Vermont, and Connecticut, aliens have the privilege to take, hold, and transmit real property.[2] A liberal policy has thus been adopted towards foreigners, worthy to be followed by Great Britain and other Continental States. In France, aliens may possess both personal and real property; yet they may not be brokers, members of the tribunals of commerce, or prudhommes. In the Two Sicilies, Sardinia, Spain, and Portugal, aliens have the same rights as those granted to their subjects by the governments of the countries to which such foreigners belong. In Holland, a foreigner acquires the same rights as native subjects, after six years' residence;[3] in Austria, after ten years, or by special authority.[4] In Russia, a foreigner, to be able to trade, must take the oath of allegiance, and be enrolled in one of the three guilds. In Sweden, a foreigner must first present himself before a burgomaster, and then he can only trade wholesale. Having examined those restraints which proceed from the possession of a character incompatible

[1] Kent's Comm. vol. ii. p. 24, 7th edit.
[2] Ibid. p. 34.
[3] Dutch Civil Code, N. 8, § 2.
[4] Austr. Civil Code, No. 28, § 3.

with trading, and from the nationality of the merchant; we now pass to personal disqualifications resulting from incapacity on account of age or condition.

Section VII.—Of Minors.

52. The law of majority is a social institution, which varies with the governments, the habits, and the climates of all countries. But, above all, it is affected by the development of moral organization, as natural capacity is the true measure of legal capacity. Majority is fixed at twenty-one in the United Kingdom, France, the two Indies, Sardinia, Bavaria, Saxony, Russia, and the United States; at twenty-three in Holland; at twenty-four in Austria and Prussia; at twenty-five in Denmark, Spain, Portugal, and in the Cape of Good Hope.

53. A minor is a person under twenty-one years of age. A person born on the 1st of January, 1830, would attain his majority on the last day of December, 1851. A minor, until he attains his majority, has no authority to enter into any contract, because of his want of sufficient discernment and understanding. He cannot bind himself by any bills of exchange, drawn, accepted, or endorsed, in the course of trade; nor can he be made a bankrupt.[1] He cannot bind himself by any deed, or alienate any land, goods, or chattels; and he would not be bound by an agreement to refer disputes to arbitration.[2] Contracts by infants are either good, void, or voidable. They are good, when entered into for necessaries; void, when they are to their prejudice; and voidable, when they are of an uncertain nature as to benefit or prejudice. Thus a minor may, for beneficial purposes, be a partner, and be entitled to all the benefits resulting from the partnership, though he will not be liable for the losses, if he choose to take advantage of his infancy.[3] He may also purchase lands, and perform other functions, notwithstanding he would not be liable for contracts entered into during his

[1] Belton *v.* Hodges, 9 Bing. 365.
[2] Milner *v.* Harewood, 18 Ves. 274.
[3] Goode *v.* Harrison, 5 B. & Ald. 156.

minority. A minor may bind himself apprentice for seven years, but it may be avoided by him at twenty-one: if, however, his father was a party to it, he would be bound.[1]

54. In Scotland, minors of the age between fourteen and twenty-one have greater latitude in their power to contract than in England; and, on the principle that the disabilities of the minor are, in fact, his privileges, it allows him power to enter into any contract, to become a partner in a company, grant bills or other personal securities, provided his inexperience be not taken advantage of, in which case the minor would be entitled to complete restitution.[2] An infant in Scotland may be the petitioning creditor in a sequestration, or be himself made a bankrupt.[3]

55. The infant, on his attaining his majority, may either confirm or annul his previous acts; but he must give notice of his intention should he desire to renounce, otherwise he will become liable.[4] Where a minor held himself out as in partnership with a person, and continued to act as such till within a short period of his coming of age, his ceasing then to act as a partner, or to purchase goods without giving notice to anybody that he had so ceased to be a partner, would not be sufficient to exonerate him from the liability of the partnership. If there were a partnership continuing when he came of age, that partnership must be taken still to have con-

[1] Woode *v.* Fenwick, 10 M. & W. 195. Gray *v.* Cookson, 16 East 13. Branch *v.* Ewington, 2 Doug. 518.

[2] Fraser's Personal and Domestic Relations, vol. ii. p. 174.

[3] Miller *v.* Aitken, 13th June, 1840, and *ibid.* The difference between the law of England and Scotland, in the age at which a minor may act as a trader, and be rendered responsible to his engagements, might be removed by fixing for the United Kingdom eighteen years as the age at which a person may bind himself by his acts of trade. When we consider the amount of information generally possessed by young men devoted to mercantile pursuits, and the business habits which they early acquire, the complete disability which attaches till the age of twenty-one may prove in many cases most injurious. No inconvenience was experienced in France when the age of majority was changed from twenty-five to twenty-one; and such is the physical and mental development now in progress in this and other countries, that a reform in this great social institution may be rendered necessary.

[4] Goode *v.* Harrison, 5 B. & Ald. 156.

tinued till something was done to dissolve it; and no notice having been given by the infant to dissolve the partnership, he continued responsible for all the debts contracted by the firm after he became of age.[1] Minors may, by statute, be shareholders in joint-stock companies, and they are liable to pay calls made whilst they were infants, unless they elect to waive or disagree to the purchase altogether, either during infancy or on attaining full age.[2] With a view to meet the looseness of proof as to the fact of acknowledgment at majority of deeds or obligations entered into during minority, it is required by statute law,[3] that in order to charge a person upon a promise made after full age to pay any debt contracted during infancy, or upon a ratification after full age of any promise or single contract made during infancy, such promise or ratification must be in writing, signed by the party himself. It is not, however, required that the sum or the date be given; it is enough if the ratification has a direct connexion with the original deed. Massey accepted a bill of exchange drawn by Hunt for 101*l.* in February 1832, payable five months after date; he being then under age; he became of age on the 19th of June, and the bill became due on the 4th of July, 1832. Hunt sued Massey, who pleaded that he was under age when he accepted the bill. The drawer of it then produced a letter in Massey's handwriting, purporting by its date to have been written after he came of age, addressed to his guardian, requesting him to pay the amount. This letter was proved to have been delivered to Hunt's clerk, but it did not appear when. It was decided that the letter must be *prima facie* presumed to have been written on the day on which it bore date, and that it amounted to a ratification of the original promise to pay, according to the tenor and effect of the bill of exchange.[4] The effect of a ratification is to set up and give validity to an otherwise invalid contract, to

[1] Good *v.* Harrison, 5 B. & Ald. 156.

[2] North West. Railway Co. *v.* M'Michael, 5 Exch. 114. Leeds and Thirsk Railway Co. *v.* Fearnley, 4 Exch. 26. Cork and Bandon Railway Co. *v.* Cazenove, 10 Q. B. 935.

[3] 9 Geo. IV. c. 14, § 5.

[4] Hunt *v.* Massey, 5 B. & Ad. 902. Harris *v.* Wall, 1 Exch. 122.

remove the bar of infancy. It may be observed that the privileges of a minor are personal privileges, and a person of full age contracting with a minor would be bound by his contract.[1]

56. By the French law, minors emancipated, of the age of eighteen years complete, may engage in trade, provided they are authorized by their father or mother, or in case of death, interdiction, or absence of the father, or, in the want of father and mother, by a deliberation of a family council confirmed by the civil tribunal, and provided also such act of authorization has been registered and put up at the tribunal of commerce of the place where the minor wishes to establish his domicile. By the authority to trade, a minor emancipated acquires a right to buy and to sell, to sign bills, and even to mortgage his property; but it seems that he has no authority to sell his real property.

Section VIII.—MARRIED FEMALES—IDIOTS—DRUNKARDS.

57. The disability of married females to trade on their own account arises from the fact that as by law all the property of the wife is vested in her husband, she is deprived of the means of satisfying private engagements.[2] Owing to the new relations in which she stands, all transactions into which she had entered before her marriage, which require a continued

[1] Warwick *v.* Bruce, 2 M. and S. 205. Taylor *v.* Croker, 4 Esp. 187.

[2] The inability of a married woman to hold property independent of her husband is founded on the principle, that the legal existence of the woman as a distinct person is suspended during marriage, and is incorporated with that of her husband. In the United States of America, by recent legislation, the relations of husband and wife in respect to the property of the latter were essentially altered. By a statute of New York of 1848, and amended in April 1849, it was enacted that the property of a woman thereafter marrying, should continue her sole and separate property, as if she were a single female, not liable to her husband's debts, nor subject to his disposal; that any married woman might inherit or take property by gift, &c., from any person other than her husband, and hold the same to her separate use in the same manner as if she were unmarried.—Kent's Comm. vol. ii. p. 109, 7th edit. A Bill has been introduced into the House of Commons this present session (1854), to enable married women to dispose of reversionary and other interests in personal estate.

assent to their subsistence, are by the marriage brought to a close. Thus, a submission to arbitration is avoided, a partnership is dissolved, and an agency is thereby recalled.[1] The disability of married women is even more conclusive than that of infants, inasmuch as the acts of an infant are voidable only, and they may be ratified at full age, but the acts of a married woman are absolutely void.

58. In England a married woman living separate from her husband, and having a separate maintenance, except where the husband has abjured the realm, or has been transported, cannot engage in trade; and neither she nor her husband, unless the latter had acquiesced to it, would be bound by the engagements resulting from her trading. In Scotland, engagements so contracted would be obligatory, and might be enforced against herself and her husband. By the custom of London, a married woman may trade as a single woman, but the trade must be carried on in the city only, on the sole account of the wife, and the husband cannot intermeddle with it. As a necessary consequence of the wife's power to trade, she may be made a bankrupt.[2]

59. Incapacity to contract is also produced by lunacy and drunkenness. Contracts made by idiots are void, because there is a want of rational and deliberate assent.[3] Whenever a person is not capable of understanding what he did when the general object of it is explained to him, his acts are altogether void. So it is in case of drunkenness: a bill of exchange signed in a state of intoxication would not be valid. If, however, when he is sober he confirms it, or does not disprove it, he would become liable to it.

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[1] Charnley *v.* Winstanley, 5 East, 266. Wrexham *v.* Hudleston, 1 Swanst. 517 n.

[2] Bright's Husband and Wife, vol. ii. p. 77; Lavie *v.* Phillips, 3 Burr. 1782—1785. The difference between the law of the two countries and the custom of the city of London may be removed by allowing a married woman to trade with the consent of her husband, and be bound by her obligations with respect to it.

[3] Yates *v.* Boen, 2 Str. 1104. Bagster *v.* Earl of Portsmouth, 5 B. and C. 170.

CHAPTER II.

OF RESTRAINTS OF TRADE, BY REGULATIONS AND PRIVILEGES.

60. The liberty of trading is no longer fettered by manifold regulations, nor restricted by the monopolies formerly granted by the crown to private individuals and companies. It has been recognised in the United Kingdom that the progress of commerce is intimately associated with unrestricted competition and complete freedom. Yet the principle is but partially admitted in other countries. Commerce in Russia is at the present day under a system of vexatious interference. All merchants there must be enrolled in one of the guilds: to be admitted to these guilds, a certain capital proportioned to the guild is required: the merchants of the first guild can trade to any amount; those of the second and third can only trade to a limited extent. A tax is also imposed for the licences required, at a rate proportioned to the character of each guild. In France, a similar system existed till 1789, when all privileges were abolished, and every one was allowed to carry on any trading, or exercise any profession, art, or craft, as he may think proper.

61. Among the restraints of trade by legislative enactments, may be classed the prohibition from contracting on Sundays or holidays. The statute of Charles II. enacts, "that no tradesman, artificer, workman, labourer, or other person whatsoever, shall exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof, (works of necessity and charity only excepted,) and that every person, being of the age of fourteen years or upwards,

offending in the premises, shall for every such offence forfeit the sum of five shillings; and that no person shall publicly cry, show forth, or expose to sale, any wares, merchandises, fruit, herbs, goods, or chattels whatsoever, upon the Lord's day, or any part thereof, upon pain that every person so offending shall forfeit the same goods, so cried, or showed forth, or exposed to sale."[1] Numerous decisions were given upon this act, tending to establish that a sale of goods made on a Sunday, which is not made in the exercise of the ordinary calling of the seller or his agent, would not be void; the words "ordinary calling" implying that which the ordinary duties of the calling bring into continued action. In order to avoid the contract, the transaction must be completed on Sunday. The mere inception of a contract on a Sunday is not sufficient to avoid it, provided it be completed the next day;[2] but if there remains nothing to be done but to append the signature on another day, the contract could not be maintained. In Scotland, bargains or engagements made on Sunday are not void,[3] but arrestment on the Lord's day is null.[4] Although it is not in the province of the civil magistrate to enforce the observance of private religious duties, the solemnization of the Sabbath, being both a Divine ordinance and a necessary arrangement in the social economy, ought to be jealously preserved as a national institution, and, with wise discretion, the laws enacted against its infringement ought not to be allowed to remain obsolete.

62. In France, by the law of 1814, all works and sales were prohibited on Sundays and holidays. At that time, however, the Charte declared the Roman Catholic religion to be *the religion* of the State; whilst the Charte of 1830 declared it to be only the religion of *the majority* of the French.[5] This difference in the relative position of the religion of the State

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[1] 29 Charles II. c. 7, § 1. See also 21 Geo. III. c. 49.

[2] Bloxham *v.* Williams, 3 B. & C. 233.

[3] Bell's Principles, § 44. Oliphant, Feb. 3, 1662. M'Pherson, &c. 1824.

[4] Stair's Institute, b. iii. tit. 1, § xxxvii.

[5] Massé, Droit Commercial, vol. ii. p. 479.

to the other religions, suggests the consideration of how far the Church of a section of the community has a right to compel general conformity to its rites and ceremonies. A law enjoining the observance of certain ferial days, established by one religion, always presupposes the superior authority of such a religion over the others, and the right also to subject them to its own regulations: a principle which operates unjustly towards the minority. With respect to the observance of the Sabbath, the universal benefit arising from such an institution outweighs any just ground of dissent on the part of the minority. Such consideration, however, can scarcely be advanced for any other fast or feast days. In England and Ireland, Good Friday and Christmas day are commonly observed as close holidays in the same manner as Sundays, though contracts made on those days are not void. But with regard to bills of exchange or promissory notes becoming due on Good Friday and Christmas day, they are by statute[1] made payable on the day before. The same is the case for any day appointed by her Majesty's proclamation, for a day of solemn fast or a day of thanksgiving. These provisions do not apply to Scotland, where Good Friday and Christmas day are not observed as holidays.

[1] 7 and 8 Geo. IV. c. 15 for England, and 9 Geo. IV. c. 24 for Ireland.

CHAPTER III.

THE LAW OF PATENT.

Section I.—NATURE AND POLICY OF PATENT LAW.

63. It is foreign to the object of this work to enter into an elaborate discussion on the principles and policy of Patent Laws. Man's ideas and thoughts are inherent with his being; he has therefore a natural right to the results of his intellectual labours, whether in literature, designs, or inventions, and to preserve a sole and exclusive power and possession over them. But it is a peculiarity of intellectual property, that it is non-existent until it be embodied in some material form, and being so embodied, it becomes communicated by publication or otherwise, so that no exclusive title to it by pre-occupation and possession can exist. It has, therefore, been deemed necessary, for the encouragement of learning and the promotion of the arts, to establish Patent Laws whereby authors and inventors may, for limited times, enjoy the exclusive right to their respective writings and discoveries. Such privileges are conceded on the ground that but for such security afforded against piracy, inventions would not be made known; that it is the expectation of deriving remuneration which acts as the main incentive to the exercise of ingenuity; and, above all, that it is just to secure a reward to ingenious men, in consideration of the great benefit they confer upon mankind. It may, however, be observed, that inventions are in some cases the result of prolonged researches and many fruitless experiments; in others, of pure accident, and even of

a mistake; they also proceed from attempts to cheapen or to improve a manufacture. Patent Laws are scarcely requisite in order to secure the publication of inventions, inasmuch as, in the nature of things, few inventions would be of any use to the inventors unless made known; whilst such laws often act injuriously in interfering with the rights of *bonâ fide* inventors, who either simultaneously, or even afterwards, but independently, may have arrived at the same result, thereby obstructing, instead of assisting, the progress of science.[1] Conceding the justness of the claims of inventors to participate in the profits derived from their inventions, the object is wholly defeated by the enormous cost of obtaining a patent in the United Kingdom, amounting to about 170*l.*, whereby inventors are often under the necessity either of keeping the secret, or of assigning the right to the patent for a trifling consideration.

64. That the Patent Laws may afford reward and encouragement to those for whose benefit they are enacted, the cost should be nominal, except what may be required for the purpose of registration and for the maintenance of a Patent Office; moreover, if the grant of a patent be to encourage inventions, it should be exclusively limited to such. Where an invention has already been used and published in other countries, it is no more an invention. Yet a patent may be obtained in the United Kingdom, for an invention already used and published in other countries, till after the expiration of the term granted by the foreign patent;[2] which is a granting

[1] The Report of the Prizes of the Exhibition of 1851, on Philosophical Instruments, and Processes depending upon their use, refers to the effects of the Patent Law in the following terms:—"We cannot help recording how clearly the injurious effects of patent enrolments on science were shown in the course of our labours. Many of the ingenious contrivances exhibited proved to be merely variations for the avoidance of infringements of patents. In many cases the subjects patented were of a very trifling nature; but still their effect was to shut up the path in that direction from further improvements. The great advance of photography, and the perfection of the microscope, are chiefly due to the avoidance of patents in connexion with their improvements."

[2] 15 and 16 Vict. c. 83, § 25.

of monopolies to mere introducers. In America, patents are awarded to original inventors only. In the Patent Office of America, there are indices of all the patents granted in every country; and before any patent is granted, it is carefully examined whether any invention on the subject, in Germany, France, England, or elsewhere, has been recorded.[1] In France, no one can obtain a patent for an invention previously patented in another country, except the original patentee or his assigns.[2] In Prussia it is the same: use and publication abroad would have the same effect as use and publication in Prussia.[3]

Section II.—Subject-matter of a Patent.

65. A patent is a grant by the Crown of the exclusive privilege of making, using, or disposing of new inventions, for a limited time. The prerogative of the Crown to grant monopolies having been exercised without discretion, a statute was passed in the reign of James, whereby all monopolies were declared to be null and void,[4] "except as to letters patent and grants of privilege, for the term of fourteen years or under, for the sole working or making of any manner of new manufactures within the realm, to the true and first inventor or inventors of such manufactures, which others, at the time of making such letters patent and inventions, shall not use."[5] A patent is granted for fourteen years, but subject to the condition of payment of certain fees and stamps,[6] at the expiration of three years and seven years respectively. The patent may be further pro-

[1] Evidence before the House of Lords on Patent Bills, 1851. (580.)

[2] Ibid. (2499, 2502.)

[3] Ibid. (2183, 2184.) It has been suggested that Patent Laws should be abolished; and it may be worthy of consideration whether it would not be advantageous to the public and to inventors, and tend to the better advancement of science and art, to establish an International Order of Merit, to be granted to inventors by a Council of Merit appointed by the respective sovereigns, and to diminish considerably the time for which letters patent are granted.

[4] 21 Jas. I. c. 3, § 6.

[5] Ibid., and Boulton *v.* Bull, 2 H. Bl. 486.

[6] See Schedule of Stamp Duties, pp. 62, 63.

longed for seven years after the expiration of the first term;[1] and if such further seven years are found not to be sufficient, the Crown may grant an extension for fourteen years longer.[2]

66. The patent must be for a manufacture. The word manufacture is of extensive signification: it applies not only to things made, but to the practice of making—to principles carried into practice in a new manner—to new results of principles carried into practice. Under things made, may be classed new compositions of things, such as manufactures in the most ordinary sense of the word; secondly, all mechanical inventions, whether made to produce old or new effects. Under the practice of making, may be classed all new artificial manners of operating with the hand, or with instruments in common use—new processes in any art, producing effects useful to the public.[3] A new application cannot be made the subject of a patent when the machinery is already known;[4] unless a very useful application and adaptation of a substance had been found, the properties and qualities of which for that particular purpose had never been known before;[5] or a new mode of arranging old materials, provided they are accessory to a new invention of a new article.[6] In improvements in machinery, if the invention consisted in a perfectly new combination of parts from the beginning, though all the parts separately might have been used before, the patent would be good.[7] No merely philosophical or abstract principle can answer to the word "manufacture;" something of a corporeal and substantial nature—something that can be made by man from the matters subject to his art and skill—or, at the least, some new mode of employing practically his art and skill, is requisite to fulfil the conditions required by this word.

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[1] 15 and 16 Vic. c. 83, § 17. [2] 7 and 8 Vic. c. 69, §§ 2, 4.

[3] Per Heath, J. Boulton *v.* Bull, 2 H. Bl. 486.

[4] Reg. *v.* Cutler, 3 Car. and Kir. 234.

[5] Per Colman, J. Walton *v.* Potter, 3 M. and G. 438.

[6] Allen *v.* Rawson, 1 C. B. 576. Templeton *v.* Macfarlane, 1 C. and Fin. N.S. 604.

[7] Bovill *v.* Moore, 2 Marshall, 212.

[8] Rex *v.* Wheeler, 2 B. and Ald. 350.

67. One of the requisites of an invention is its utility: it must be useful for the purpose. An invention may fail in two ways. A man may describe a machine, and say it does so much; if, when it comes into actual practice, it fails to produce that result, there is an end of the patent. It may fail in another way. It may produce a movement; but a movement, like gold, may be bought too dear: it may be of no advantage whatever when it comes to be used. It may be such, that though possibly the effect may be produced which the inventor pretends to produce by it, yet it may be produced at such cost, that it is not sufficiently counterbalanced by the actual good resulting from it: and if it be found that the old way is better with all its disadvantages, then the patent fails because the invention is not useful.[1]

Section III.—PRIORITY OF INVENTION.

68. To give a right of a patent, there must be priority in the use and publication of the invention.[2] The patentee must be the true and first inventor, and a person cannot obtain a patent for an invention which has been communicated to him by another within the realm.[3] The question of priority is often of considerable difficulty. Scientific men have frequently at the same time, independently of each other, arrived at the same stage of progress, which has arisen from previous stages which have been published; but if a man arrives at one of those stages, and does not think that that stage is of any value, and therefore does not claim the idea to himself, and if another man afterwards has arrived at the same idea, and makes use of that idea for the benefit of the public, the right of the first man is extinguished, and he is not entitled, under these circumstances, to come forward and oppose the claim of another. There are many instances of things being kept secret and not published. In the case of the achromatic telescope, it was invented by

[1] Per Lord Brougham, arg. Crossley *v.* Beverley, Nisi Prius, Webst. Pat. Cases, 109. Norman on Patent, p. 25.

[2] Mullins *v.* Hart, 3 Car. and Kir. 297.

[3] Beard *v.* Egerton, 3 C. B. 97.

a country gentleman of the name of Hall, who did not choose to take out a patent, but put the instrument into his drawer. Mr. Dollond obtained a patent for it afterwards. This instrument, after the death of Mr. Hall, was found to be the real achromatic telescope. It was decided that Mr. Dollond's patent was not vitiated by the previous discovery of Mr. Hall, who had not made it public.[1] The party who is entitled to a patent is the inventor himself, and the person who suggests the principle is the true inventor.

Section IV.—PROCEEDING TO OBTAIN A PATENT.

69. The mode of proceeding to obtain a patent is now defined by the new act, by which a Commission of Patents for invention was constituted, consisting of the Lord Chancellor, and the law officers for England, Ireland, and Scotland. An inventor must apply to the Crown by a petition, leaving with it the provisional specification describing the whole nature of the invention. The petition must bear a stamp of 5*l*. The day of delivery of such petition and declaration is to be recorded at the office, and endorsed on the petition.[2] The provisional specification is referred to the law officer, who, if satisfied, may give a certificate of his allowance; and then the invention may be used and published, being protected for six months from the date of the application, which is called provisional protection.[3] An inventor may also deposit a complete specification, which would have the same effect as a provisional specification. The invention so protected is forthwith advertised in the *London Gazette;* and any persons opposing the grant of letters patent are at liberty to make their objections, which are referred to the law officer.[4] The letters patent issued under the Great Seal extend to the whole of the United Kingdom of Great Britain, the Channel Islands, and the Isle of Man, but not to any of the

[1] Evidence of Sir D. Brewster before the House of Lords. (2445, 2446.)
[2] 15 and 16 Vict. c. 83, § 6. [3] Ibid. § 9. [4] Ibid. §§ 12, 13.

Colonies,[1] unless specifically included in the letters patent; and it is always understood that no letters patent so granted shall have any effect in any Colony in which such patent would be invalid by the law there in force at the time.[2]

70. No letters patent, except where the patents are destroyed or lost, ever issue on any warrant, unless application be made to seal such patents within three months from the date of warrant, or unless the same be granted before the expiration of the provisional protection.[3] When the applicant dies during the continuance of the provisional protection, or of the deposit of a complete specification, letters patent may be granted to the personal representatives during the continuance of the protection, or within three months after the death of such applicant, notwithstanding the expiration of the term of the provisional protection. If letters patent be destroyed or lost, others may be issued. The letters patent may bear the date of the day of the application for the same, or of the day of provisional registration; and where antedated, they are of the same validity as if they had been sealed on the day therein expressed; and until letters patent are actually granted, for which a complete registration has been deposited, no proceedings may be had for any infringement committed.[4] A

[1] The state of the patent law in the Colonies varies considerably. From an inquiry transmitted through the medium of the Colonial Office by Mr. Curtis, with a view to apply an invention to the Colonies, it appeared that in Canada, letters patent for invention are granted only to subjects resident in the province. In Nova Scotia, one year's residence is necessary, and the deposit of the model of the invention. In New Brunswick and Prince Edward's Island, there are local patent laws. In Newfoundland, an oath or affirmation must be made, proving the petitioner to be the inventor. In Jamaica, Antigua, and Barbadoes, an agent should be appointed to introduce a Bill into the legislature. In Victoria, Van Diemen's Land, the Bahamas, Grenada, St. Lucia, Nevis, and British Guiana, there are no patent laws. In St. Christopher and Trinidad, a patent may be obtained. In New South Wales, a deposit of 20*l.* is required to be made with the Colonial Treasurer, and petition then made to the Governor in Council, with full specification of the particulars of the invention. For Madras, Bombay, and Bengal, Mr. Curtis was referred to the East India House. (See Journal of the Society of Arts, vol. ii. p. 213.)

[2] Minter *v.* Wells, Webst. Pat. Cases, 132.

[3] 15 and 16 Vict. c. 83, §§ 19, 20.

[4] Ibid. §§ 21—29.

letter patent may also be obtained for patented foreign inventions, but all rights and privileges will cease and be void immediately upon the expiration of the foreign patent; and no patent in the United Kingdom would be valid if granted after the foreign patent for the same invention has expired.[1] An importer of a foreign invention, by which the public is benefited, is entitled to be put on the same footing as an original inventor, when applying for a prolongation for such foreign importation.[2]

Section V.—TITLE AND SPECIFICATION OF A PATENT.

71. The title of the patent must be clear and specific. It must not claim more than the invention, as explained by the specification. The mere vagueness of the title may be an objection that may well be taken on the part of the Crown before it grants the patent, but it is not sufficient ground to avoid the patent after it has been granted. The patent is generally granted under condition that the patentee shall describe and ascertain the nature of his invention, and in what manner the same is to be performed within a certain time: this is called the specification. This specification is the very foundation of the patent. In preparing a specification, it is necessary to examine thoroughly the existing state of the art in which the invention is made, in this and other countries, and to ascertain exactly in what the improvement consists. If the invention is an old principle carried out by a new machinery, the claim must be restricted to that which is really new in the mode of working. Nothing is to be claimed which is not new and useful. Vague generalities must be avoided, lest something not new and useful should be embraced. The patentees must also describe freely and fully, in plain language, the mode in which the invention is to be carried out, the processes, and the proportions of ingredients of any composition, and also the uses of all and any part of the

[1] 15 and 16 Vict. c. 83, § 25.

[2] In *re* Berry's Patent, 7 Moore's Rep. P. C. 187.

machinery.[1] The specifications are to be filed in the Court of Chancery, instead of being enrolled as formerly.[2] Certified printed copies of specifications, disclaimers, and memoranda of alterations, are transmitted to the Director of Chancery in Scotland, and to the Court of Chancery in Ireland, which shall be evidence without production of originals.[3]

Section VI.—NOTICE OF ALTERATION IN A PATENT.

72. When the patentee sees fit to withdraw some of the points which might afford ground of objection to the whole patent, he may enter a memorandum of any alteration either in the title or in the specification. This is called a disclaimer, the application for which is to be made at the office of the Commissioners.[4] The intention of the legislature is to allow a specification to be amended at any time by a disclaimer subsequently enrolled, and to provide that such disclaimer, having been perfected after proper precautions taken by the law officers of the Crown, and after such terms have been imposed as they in their discretion shall have thought fit, is to be deemed and taken to be a part of the original specification, except in actions pending at the time of its enrolment.[5] A memorandum of alteration is, therefore, part of the specification, and must be dealt with in the same manner as the specification.[6]

73. The filing of a disclaimer, except in case of fraud, is deemed conclusive as to the right of the parties to enter such disclaimer. No action can be brought upon any letters patent or specification on which any disclaimer or memorandum of alteration shall have been filed, in respect of any infringement prior to the filing of such disclaimer, unless allowed by the law officer.[7] Any person, however, may enter a caveat, or his

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[1] Norman on Patent, p. 75.
[2] 15 and 16 Vict. c. 83, § 27.
[3] 16 and 17 Vict. c. 115, § 5.
[4] 5 and 6 Will. IV. c. 83, § 1.
[5] Rex *v.* Mill, 20 L. J. C. P. 16.
[6] Perry *v.* Skinner, 2 M. and W. 471. Stead *v.* Carey, 1 C. B. 520.
[7] 15 and 16 Vict. c. 83, § 39.

objection, against such disclaimer or alteration, by which he will have a right to have notice of the application being heard by the law officer.[1] In case the patentee has assigned a part or the whole of his interest in the patent, a disclaimer and memorandum of alteration may be made notwithstanding, by himself alone, or by himself and the assigns.[2]

Section VII.—PROPERTY IN PATENTS AND ASSIGNMENT.

74. It is lawful for a larger number than twelve persons to have a legal and beneficial interest in a patent.[3] The patentee may assign the patent for England, Scotland, or Ireland respectively, as effectually as if the patent extended to England, Scotland, or Ireland only. A register of proprietors is now kept, wherein is entered the assignment of any patent, and the district to which such licence relates, with the name of any person having any share or interest in such letters patent, the date thereof, and any other matter affecting the proprietorship in such patent or licence; and a certified copy of the entry may be given to any person on payment of certain fees, which certified copy is proof of the assignment, or of the licence or proprietorship. Until such entry has been made, the grantee of the letters patent is deemed the sole proprietor. Certified duplicates of all entries are also transmitted to Edinburgh and Dublin. Any falsification or forgery of entries is deemed a misdemeanour; and if any person deems himself aggrieved by any entry, he may apply to the Master of the Rolls, or other courts of law, for an order that such entry may be expunged; and upon such application, the Master of the Rolls or such court may make such order for expunging, vacating, or varying such entry.[4] An assignment of a patent, as of any incorporeal personal property, may be made without deed.[5]

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[1] 5 and 6 Will. IV. c. 83, § 1. 12 and 13 Vict. c. 109, § 15.
[2] 7 and 8 Vict. c. 69, § 5. [3] 15 and 16 Vict. c. 83, § 36.
[4] 15 and 16 Vict. c. 83, §§ 35, 37, 38.
[5] Williams' Personal Property, p. 188.

Section VIII.—REMEDIES AGAINST INFRINGEMENT.

75. Remedies against the infringement of the patent may be obtained in the superior Courts of Common Law,[1] or Chancery, either of which will grant injunctions to restrain persons from using the invention without licence, and for an account of the profits made by the wrongful use of the patent,[2] and also for fraudulently using the name or mark of the patentee.[3] If a manufacturer uses a certain mark or sign to distinguish his articles from those belonging to others, the law will throw a protection over such mark, and he may obtain an injunction to restrain a fraudulent invasion of his right,[4] provided the mark denotes the origin or ownership of his articles, and not simply their name or quality. Even a colourable imitation will be restrained, and it would be no excuse that dealers were informed of the imitation. By a statute of New York passed in 1850, the forging of trade marks, with intent to deceive or defraud the purchaser or manufacturer, is made a misdemeanour, and the vending of goods with forged stamps, *scienter*, without disclosing the fact to the purchaser, is likewise made penal.[5]

SCHEDULE OF STAMP DUTIES TO BE PAID UNDER THE 15 AND 16 VICT. C. 83, AND 16 VICT. C. 5.

	£	s.	d.
On Petition for Grant of Letters Patent	5	0	0
On Certificate of Record of Notice to proceed	5	0	0
On Warrant of Law Officer for Letters Patent	5	0	0
On the Sealing of Letters Patent	5	0	0
On Specification	5	0	0
On the Letters Patent, or a Duplicate thereof, before the expiration of the third year	50	0	0

[1] 14 and 15 Vict. c. 99. [2] 6 Vict. 706. [3] 5 and 6 Will. IV. c. 83, § 7.
[4] Blofeld *v.* Payne, 4 B. and Ad. 410. Sykes *v.* Sykes, 3 B. and C. 541. Edelsten *v.* Vick, 1 Eq. Dig. 413.
[5] See Kent's Commentary, vol. ii. p. 446 n., seventh Ed.

	£	s.	d.
On the Letters Patent, or a Duplicate thereof, before the expiration of the seventh year	100	0	0
On Certificate of Record of Notes of Objections	2	0	0
On Certificate of every Search and Inspection	0	1	0
On Certificate of Entry of Assignment or Licence	0	5	0
On Certificate of Assignment or Licence	0	5	0
On Application for Disclaimer	5	0	0
On Caveat against Disclaimer	2	0	0
On Office Copies of Documents, for every ninety words	0	0	2

The cost of a patent in foreign countries is as follows :—

In the United States of America, for a citizen of the United States, 30 dollars, or about 6*l.* 5*s.*; for foreigners generally, 300 dollars, or 63*l.*; and for a subject of Great Britain, 500 dollars, or 10*l.* 6*s.*

In France, 500 francs, or 20*l.* for five years; 1000 francs, or 40*l.* for ten years; and 1,500 francs, or 60*l.* for fifteen years. The tax is payable at 100 francs, or 4*l.* per annum.

In Spain, 1,000 reals, or 11*l.* for five years; 3,000 reals, or 33*l.* for ten years; 6,000 reals, or 66*l.* for fifteen years.

In Austria, 10*l.* for the first five years; 20*l.* for the first ten years; 40*l.* for the last five years; and 70*l.* for fifteen years.

In Belgium, 6*l.* for five years; 12*l.* to 16*l.* for ten years; and 24*l.* for fifteen years.

In Russia, 15*l.* for three years; 25*l.* for five years; 75*l.* for 15 years.

In Netherlands, 12*l.* 10*s.* for five years; 25*l.* for ten years; 55*l.* for fifteen years.

CHAPTER IV.

THE LAW OF COPYRIGHT.

Section I.—NATURE AND HISTORY OF COPYRIGHT.

76. Copyright is the exclusive right of the authors of books, maps, charts, and musical compositions, and of the designers of prints and engravings, to multiply copies of their own works. Based on the same principle as the Law of Patent, it is a limited monopoly, granted for the purpose of encouraging and rewarding intellectual labour; and, as in the case of patents, legislative interference was required in order to afford protection to authors against piratical publication of their works. The decrees of the Star-Chamber show that that court admitted and protected the rights of authors as early as 1556. Then the Stationers' Company was incorporated; and from that time to 1640, the Crown exercised an unlimited authority over the press. Ordinances of Parliament, as far back as 1641, recognised the exclusive rights of authors to their own productions; and, in 1662 and 1679, Acts of Parliament were passed prohibiting any person from printing, without the consent of the owner of the copy.[1] In the reign of Charles II. copyright was acknowledged by Chief Justice Hale, and treated by him as the ancient Common Law. Still the question remained in an unsatisfactory state until the first statute on copyright[2] was passed in 1710, whereby authors were secured of a copyright for fourteen years. The constant recurrence of piracy continued, however, to create serious disputes, and the whole

[1] Maugham, 15, 16. Wheaton *v.* Peter, 8 Peters, 597. [2] 8 Anne, c. 19.

question respecting the literary property of authors was made a subject of judicial investigation in 1769, when the case of Miller *v.* Thomson,[1] decided, by a majority of three Judges, including Lord Mansfield, that copyright belonged to the author by common law. The question yet remained to be solved, whether, on the expiration of the fourteen years granted by the statute of Anne, authors could resort to their natural right against piracy; this the House of Lords solemnly decided in the negative, so that the common law right of action, if any existed, could not be exercised beyond the time limited by the statute. The privilege of copyright being thus under the exclusive protection of statute law, it was deemed expedient to extend the period of protection from fourteen years to twenty-eight years,[2] and subsequently to forty-two years, by the statute now in force.[3]

77. The protection of copyright was first granted by the Senate of Venice, in 1469.[4] In Spain, copyright was introduced in the reign of Isabella. The French law of copyright is founded on the republican decree of 1793; it granted copyright for the author's life, and to his wife, if she survives, for her life, and to their children for twenty years, and if they leave no children, to their heirs or assigns for ten years. In the United States of America, by the act of Congress of 1831, copyright was granted for twenty-eight years, with a right of renewal for the widow or children for the further term of fourteen years. In Prussia, by the ordinance of 1837, copyright continues for the author's life, and to his heir for thirty years after his death. In Denmark, Norway, Sweden, and Spain, copyright is perpetual. By the law of Russia of 1828, copyright is for the author's life, and to his heir after his death for twenty-five years. In Austria, copyright is for the author's life. In Holland and Belgium, the duration of copyright is to the author's life, and to his heirs and assigns for twenty years after his death.

78. A book, for the purpose of copyright, is construed to

[1] 3 Burr. [2] 54 Geo. III. c. 156. [3] 5 & 6 Vict. c. 45, § 3.
[4] Hallam's Literature of Europe, vol. i. p. 344—348.

include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published. Copyright in books published during the lifetime of the author endures for the natural life of the author, and for the further term of seven years, commencing at the time of his death, during which time the book remains the property of such author and his assigns. If the seven years expire before the end of forty-two years from the first publication of such book, the copyright in that case endures for such period of forty-two years; and the copyright in every book published after the death of its author endures for the term of forty-two years from the first publication thereof; during which time it is the property of the proprietor of the author's manuscript from which such book is first published, and his assigns.[1]

79. In cases of subsisting copyright, at the time of passing the Copyright Act in 1842, the term was also extended, except when it belonged to a publisher, or other person who had acquired it for other consideration than that of natural love and affection, in which case it endured only for the term which then subsisted; unless, before the expiration of such term, the author, or his personal representative, agreed to accept the benefit of the act in respect of such book.[2] In order to provide against the suppression of books of importance, the Judicial Committee of the Privy Council was authorized to license the republication of books which the proprietors refuse to republish after the death of the author.[3] The copyright of any encyclopædia, review, magazine, and other periodical works, belongs to the proprietors of the work, whenever they have been composed for the proprietor, who shall enjoy the same rights as if he were the actual author thereof.[4] But that the copyright may vest in the proprietors, payment must be actually made to the author.[5] In the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works, after

[1] 5 & 6 Vict. c. 45, § 3. [2] Ibid. § 4. [3] Ibid. § 5. [4] Ibid. § 18.
[5] Richardson *v.* Gilbert, 1 Sim. N. S. 336.

the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form reverts to the author for the remainder of the term of forty-two years. During these twenty-eight years the proprietors cannot publish any such essay separately, without the consent of the author or his assigns; but any author may, by contract, reserve to himself a right to the copyright in such composition when published in a separate form, without prejudice to the right of the proprietor of the publication where such composition has first appeared.[1] No person, except the proprietor of the copyright, can import into the United Kingdom, or into any part of the British dominions, for sale or hire, any book first composed or written, or printed and published, in any part of the United Kingdom, and reprinted elsewhere, under penalty of forfeiture thereof, and also of 10*l.* and double the value of every copy of such book so imported. Such books are to be seized by the officers of customs or excise.[2]

Section II.—DELIVERY OF COPIES TO PUBLIC LIBRARIES.

80. A printed copy of the whole of every book published, together with all maps, prints, or other engravings belonging thereto, and also of any second or subsequent edition with any addition or alteration, must be delivered for the use of the British Museum, within one calendar month after the day of publication, (that is, after the day on which such book is first sold, published, or offered for sale,) if within the bills of mortality; or within three months, if published in any other part of the United Kingdom; or within twelve months, when published in any other part of the British dominions. Such copies, bound, sewed, or stitched together, and upon the best paper, must be delivered at the British Museum, between the hours of ten and four, on any day except Sunday and holy-days, to some person authorized by the trustees, in the Museum, who will give a receipt in writing for the same.

[1] 5 & 6 Vict. c. 45, § 18. [2] Ibid. § 17.

Another copy of such books must also, on demand in writing, be delivered, within twelve months after the publication thereof, to the officer of the Stationers' Company, for the following libraries: the Bodleian Library, at Oxford; the Public Library, at Cambridge; the Library of the Faculty of Advocates, at Edinburgh; the Library of Trinity College, at Dublin. Publishers may deliver the copies to the libraries, free of expense, instead of at the Stationers' Company. If any publisher neglect to deliver such copies, he forfeits, besides the value of such copies of such book, a sum not exceeding *5l.*, to be recovered by the librarian or other officer of the library in a summary way, on conviction before two justices of the peace for the county or place where such publisher resides, or by action for debt, or other proceeding of the like nature, at the suit of such librarian or officer, in any court of record in the United Kingdom; in which action, if the librarian shall obtain a verdict, he shall recover his costs reasonably incurred, to be taxed as between attorney and client. The difference between the British Museum and other libraries is, that to the former the copy must be on the best paper, and be delivered without demand; to the latter, a copy of any of the common editions is sufficient, and must be delivered only on demand.[1]

Section III.—Registry of Stationers' Hall, and Assignment.

81. A book of registry for the proprietorship in the copyright of books, and assignment thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, is kept at the Stationers' Hall, open to the inspection of any person, on payment of one shilling for every entry which is searched for or inspected in the book; and a certified copy may be given of any entry in

[1] 5 & 6 Vict. c. 45, §§ 6—10.

such book by the officer to any person requiring the same, on payment of five shillings; such copies to be *primâ facie* proof of the proprietorship, or licence of copyright or licence, but subject to be rebutted by other evidence.[1] Any person making a false entry in such book is deemed guilty of misdemeanour. The proprietor of copyright of any book may make entries in the registry at the Stationers' Hall of the title of the book, the time of the first publication, the name and place of abode of the publishers, and of the proprietor of the copyright of the book, or of any portion of such copyright, upon payment of five shillings to the officer of the company; and every such registered proprietor may assign his interest, or any portion of it, by making entry in the book of registry of such assignment, and of the name and place of abode of the assignee, on payment of a like sum; such assignment so entered to be effectual at law, without being subject to any stamp or other duty, and to have the same force as if such assignment had been made by deed.[2]

82. If any person thinks himself aggrieved by any entry made in the book of registry, he may apply to a court of law in term, or judge in vacation, who may order such entry to be varied or expunged.[3] No assignment of the copyright of any book, or dramatic piece, or musical composition, is held to convey the right of representing or performing such dramatic piece or musical composition, unless an entry in the registry book is made of such assignment. And no proprietor of copyright in any book can maintain any action for the infringement of such copyright, unless, before commencing such action, he has made an entry in the registry book; in default of which, though his right to copyright is not thereby affected, he has no right to sue for the infringement thereof. This, however, does not affect the remedies of the proprietors of dramatic pieces or musical compositions.[4] All copyright is deemed personal property, and is transmissible by bequest,

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[1] 5 & 6 Vict. c. 45, § 11. [2] Ibid. § 13. [3] Ibid. § 13.
[4] Ibid. § 24. Russell *v.* Smith, 12 Q. B. 217.

or, in case of intestasy, is subject to the same law of distribution as other personal property, and in Scotland is deemed to be personal and moveable estate.[1]

Section IV.—FOREIGN COPYRIGHT.

83. Copyright in the United Kingdom is a right regulated by statute law, which applies to aliens as well as natural-born subjects, within the British territory. Therefore, a foreigner domiciled in England, although neither naturalized nor made a denizen, if he composes a literary work here, may acquire a copyright in it. A question, however, of importance has been raised, whether the protection of the British copyright would be granted to foreign authors, for works written abroad, but first published in this country. Bellini, a foreigner, residing at Milan, composed the work of "Sonnambula," in 1831, and in the same year he transferred the copyright to Ricordi. The latter came to this country, and assigned the copyright of the opera to Boosey & Co., for publication in the United Kingdom only. Having made due entry at the Stationers' Hall, ten airs of the opera were exposed for sale on the same day, at London, by Boosey & Co., and at Milan, by Ricordi. At a later period these airs were publicly sold at Purday's shop, without the permission of Boosey, and the latter entered an action for infringement of copyright. Purday maintained that there could be no copyright in the "Sonnambula," the work having been written abroad. The case was decided by Chief-Baron Pollock, that Bellini, a foreigner, by sending to and first publishing his work in Great Britain, could acquire no copyright in this country.[2] After this decision, in 1849, Boosey & Co. brought an action against Jefferys, for another breach of copyright in the same musical composition; and it was again decided by Baron Rolfe (now Lord Chancellor Cranworth), that Boosey & Co. had no copyright in the "Sonnambula." To this a bill of exception was tendered, and the case was brought before the Exchequer Chamber.

[1] 5 & 6 Vict. c. 45, § 25.

[2] Boosey *v.* Purday, 4 Exch. 145.

84. Judgment was then given by Lord Campbell, to the effect that if an alien residing in his own country were to compose a literary work there, and, continuing to reside there without having before published his work anywhere, should cause it to be first published in England, in his own name and on his own account, he would be an author within the meaning of the statute for the encouragement of learning, and might maintain an action against any one who, in this country, should pirate his work; provided, however, the work was first published in England.[1] An appeal or a writ of error was thereupon brought to the House of Lords; and there the judgment of the Exchequer Chamber was reversed, it having been finally decided that the statute of Anne could only affect British subjects properly so called, or such persons who might obtain that character for a time, by being resident in this country, and therefore under allegiance to the crown, and under the protection of the laws of England; that it referred to books printed and first published in this country, and not to books printed abroad, and then imported into the United Kingdom; that Bellini must have resided in England, in order to possess the copyright, and that, therefore, he had no legal power to assign that copyright, as regarded this country; and the assignment not being valid, the right of action of Boosey against Jefferys could not be maintained.[2] It may be difficult to ascertain what is a sufficient residence in this country to entitle a foreigner to the benefit of its law, but this is to be determined by the question of national character.[3]

Section V.—COPYRIGHT IN WORKS OF ART AND MANUFACTURE.

85. Copyright in Engravings and Prints, including Historical or other prints, is secured for twenty-eight years from the publication thereof;[4] in Busts and Sculptures, for fourteen

[1] Boosey *v.* Jefferys, 6 Exch. 580, 597.

[2] Jefferys (in error) *v.* Boosey (in error). 23 L. T.

[3] See p. 57.

[4] 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; 6 & 7 Will. IV. c. 59.

years from the time of first publication, and for the further term of fourteen years, in case the maker of such sculpture shall be still living;[1] in Drama, the same as in Books, for the author's natural life, and seven years after his death, or forty-two years from the time of first representation or performance.[2] In Lectures, the sole right of publishing them rests with the authors; and if any person, by taking down in short-hand or otherwise in writing, cause the same to be printed and published without leave of the author thereof, he is subject to the penalty of the forfeit of the copies, and one penny for every sheet thereof which shall be found in his custody; the publishers of the same being liable to the same forfeitures and penalties in respect of such printing and publishing. No persons, having leave to attend any lecture for certain fee and reward, are thereby allowed to print and publish such lectures, only because of having attended them. This does not prohibit the publishing of lectures after the expiration of the copyright; but this exclusive right does not extend to Lectures delivered in unlicensed places, or to Lectures delivered in any University, or public school or college, or on any public foundation, or by any individual, in virtue of, or according to any gift, endowment, or foundation.[3] Copyright in designs varies according to the nature of the article. First, for Ornamenting articles in metal, in wood, in glass, and in earthenware, for three years from the time of registration; so for Paper-hangings, Carpets, floor and oil Cloths, for three years; Shawls, patterns printed, for nine months; ditto, not printed, three years; Woven fabrics, not furnitures, patterns printed, nine months; Woven fabrics, furnitures, patterns printed, three years; Woven fabrics, patterns not printed, twelve months; Woven damasks, three years; Lace, and all other articles, twelve months.[4]

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[1] 38 Geo. III. c. 71. 54 Geo. III. c. 56.

[2] 3 & 4 Will. IV. c. 15. 5 & 6 Vict. c. 45, §§ 20—22. 6 & 7 Vict. c. 68.

[3] 5 & 6 Will. IV. c. 65.

[4] 5 & 6 Vict. c. 100. 6 & 7 Vict. c. 65. 13 & 14 Vict. c. 104. Burke's Supplement to Godson, p. 60.

Section VI.—INFRINGEMENT OF COPYRIGHT.

86. Any person printing, either for sale or for exportation, any book in which there is a subsisting copyright, without the consent in writing of the proprietor thereof, or who imports for sale or hire any such book so unlawfully printed beyond the seas; or knowing such book to have been so unlawfully printed or imported, should sell, publish, or expose for sale, or should have in his possession for sale or hire, any such book, would be liable to a special action before any court of record in that part of the British dominions in which the offence is committed. In actions for piracy, the person sued must give notice of the objections on which he means to rely. If the nature of his defence be, that the person suing was not the author or first publisher of the book in which copyright is claimed, or is not the proprietor of the copyright therein, or that some other person was the author or first publisher of such book, or is the proprietor of the copyright therein, then, to render the defence valid, the person sued must specify in the notice of his objections to the action, the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise no evidence against the action for piracy would be allowed.[1] All copies of any pirated book become the property of the proprietor of the copyright, and such registered proprietor may be entitled to recover the same by action.[2]

87. The question, what is an infringement of the author's copyright? is one of considerable nicety. The learned American judge, Mr. Justice Story, gave the following luminous, full, and philosophical judgment on an infringement of the copyright, in a book called "Emerson's North American Arithmetic:"—

"The differences between different works are often of such

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[1] 5 & 6 Vict. c. 95, §§ 15, 16.

[2] Ibid. § 23.

a nature that one is somewhat at a loss to say whether the differences are formal or substantial. In many cases, the mere inspection of a work may at once betray the fact that it is borrowed from another author, with merely formal or colourable omissions or alterations. In other cases, we cannot affirm that identity in the appearance or use of the materials is a sufficient and conclusive test of piracy, or that the one has been fraudulently or designedly borrowed from the other. In truth, in literature, in science, and in art, there are and can be few if any things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art, borrows, and must necessarily borrow and use, much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book; he contents himself with the use of language already known, and used, and understood by others. No man writes exclusively from his thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, excelled, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times, and we should be obliged to ascend very high even in antiquity to find a book entitled to such eminence. Virgil borrowed from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakspeare and Milton, so justly and proudly our boast as the brightest originals, would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days. What is La Place's great work but the combination of the processes and discoveries of the great mathematicians before his day, with his own extraordinary genius? What are all modern law books, but new combinations and arrangements of old materials, in which the skill and judgment of the author, in the selection,

and exposition, and accurate use of those materials, constitute the basis of his reputation as well as of his copyright. Blackstone's Commentaries and Kent's Commentaries are but splendid examples of the merit and value of such achievements.

88. "In truth, every author of a book has a copyright in the plan, arrangement, and combination of his materials, and in his mode of illustrating the subject, if it be new and original in its substance. Nay, the right to a copyright goes much further. A man has a right to a copyright in a translation upon which he has bestowed his time and labour. To be sure, another man has an equal right to translate the original work, and to publish its translation; but then it must be his own translation, by his own skill and labour, and not the mere use and publication of the translation made by another. A man has a right of a copyright of a map of a state or country, which he has surveyed or caused to be compiled from existing materials, at his own expense, or skill, or labour, or money. Another man may publish another map of the same state or country by using the like means or material, and the like skill and labour, at his own expense; but then he has no right to publish a map taken substantially and designedly from the map of the other person, without any such exercise of skill, or labour, or expense. If he copies substantially from the map of the other, it is downright piracy, although it is plain that both maps must be the more accurate, the more they approach nearer in design and execution to each other. He, in short, who by his own skill, judgment, and labour, writes a new work, and does not merely copy that of another, is entitled to a copyright therein, if the variations are not merely formal and shadowy from existing works. He who constructs, by a new plan, and arrangement, and combination of old materials, a book designed for instruction either of the young or of the old, has a title to copyright which cannot be displaced by showing that some part of the plan, or arrangement, or combination, has been used before." [1]

[1] Emerson *v.* Davies, 3 Story, 768.

89. The true test of what is or is not piracy is to ascertain whether the plan, arrangement, and illustrations of the original work have been used as the model of the new book, with colourable alterations and variations only to disguise the use thereof; or whether the new work is the result of the writer's own labour, skill, and use of common materials and common sources of knowledge, open to all men, the resemblances being either accidental, or arising from the nature of the subject. It is a nice question, what shall be deemed such a modification of an original work as shall not infringe the copyright of the original in the new composition? No doubt such a modification may be allowed in some cases, as in that of an abridgement or a digest; such publications are in their nature original: their compiler intends to make of them a new use, not that which the author professed to make. Digests are of great use to practical men, though not so comparatively to students. The same may be said of an abridgement of any study; but it must be a *bonâ-fide* abridgement, because, if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgement commits a piracy.[1]

Section VII.—INTERNATIONAL COPYRIGHT.

90. The expediency of putting an end to piracy of intellectual labours between the subjects of friendly States, as it is provided by law between the subjects of the same country, has been universally acknowledged, and was made the subject of formal conventions between her Majesty's Government and that of several European States. In 1844 an act[2] was passed, whereby her Majesty was empowered, by an Order in Council, (which Orders in Council were issued by her Majesty with respect to such States as are hereafter described,) to direct that the authors, designers, engravers, &c., and their respective executors and assigns, might have the privilege of copyright in the United Kingdom in any book, prints, articles of sculpture, and other works of art first

[1] D'Almaine *v.* Boosey, 1 Y. & C. 301.

[2] 7 & 8 Vict. c. 12.

published in any foreign country; the same to be protected and governed by the copyright law of this country, except in so far as it relates to the delivery of copies of books at the British Museum and other libraries. Her Majesty was also empowered, by Order in Council, to direct that authors and composers of dramatic pieces and musical compositions, first publicly represented and performed in foreign countries, might have similar rights to the sole liberty of representing or performing in any part of such, in the British dominions. In order that the author of any book, dramatic piece, or musical composition, or the inventors, designers, or engravers of any print, or maker of any article of sculpture, or other works of art, or their assigns, &c., be entitled to the benefit of this act, they must observe the following particulars as to registry and delivery of copies, within the time prescribed in the order in council:—

91. As regards any book and dramatic pieces or musical composition, the title of such copy, the name and place of abode of the author or composer, and of the proprietor of the copyright thereof, the time and place of the first publication and performance in the foreign country named in the order in council, should be entered in the registry-book of the Stationers' Company in London; and one printed copy of the whole of such book, and of such dramatic pieces or musical composition, and of every volume thereof, upon the best paper, together with all maps and prints relating thereto, should be delivered to the same company; the same particulars to be observed as regards dramatic pieces and musical compositions, in manuscript, and prints and sculpture, except that no article of sculpture need be delivered, but a descriptive title thereof;[1] second or subsequent editions not necessary to be delivered to the Stationers' Company, unless the same contains additions or alterations.[2]

92. In case of books published anonymously, it is sufficient that the name of the publisher thereof be entered in the register, together with a declaration that such entry is

[1] 7 & 8 Vict. c. 12, §§ 4—6. [2] Ibid. § 12.

made either on behalf of the author, or on behalf of the first publisher.[1] The provisions of the Law of Copyright,[2] as regards entries in the register of the Stationers' Company, apply also to entries under this act. Every entry of a first publication is *primâ facie* proof of first publication; and if there be a wrongful first publication, and any party has availed himself thereof to obtain an entry of a spurious work, no order for expunging or varying such entry shall be made, unless it be proved, first, with respect to a wrongful publication in a country to which the author or first publisher does not belong, and in regard to which there does not subsist with this country any treaty of international copyright, that the party making the application was the author or first publisher, as the case may require; second, with respect to a wrongful first publication, either in the country where a rightful first publication has taken place, or in regard to which there subsists with this country a treaty of international copyright, that a Court of competent jurisdiction in such country has given judgment in favour of the right of the party claiming to be the author or first publisher.[3]

93. The Orders in Council may specify different periods for different countries, and for different classes of works; but it must be conditional that reciprocal protection is secured. This, however, would not have prevented the publication of translations, which was met by a subsequent act,[4] to enable Her Majesty to carry into effect a convention with France on the subject of copyright. By this act Her Majesty was empowered, by Order in Council, to direct that the authors of books published in foreign countries might prevent the publication in the British dominions of any translations of such books not authorized by them for a limited time, not extending beyond the expiration of five years from the time at which the authorized translations of such books are first published; and, in the case of books published in parts, not extending as to each part beyond the expiration of five years

[1] 7 & 8 Vict. c. 12, § 7.
[2] 5 & 6 Vict. c. 45.
[3] 7 & 8 Vict. c. 12, §§ 8, 9.
[4] 15 & 16 Vict. c. 12.

from the time at which the authorized translation of such part is first published. Thereupon the law of copyright shall be applied for the purpose of preventing the publication of such translations.[1] The same powers are also given against unauthorized translations of dramatic pieces, for a time not exceeding five years from the first publication of the author's translations.

94. No author is entitled to the benefit of this act without complying with the following requisitions:—

(1.) The original work from which the translation is to be made must be registered, and a copy thereof deposited in the United Kingdom, in the manner required for original works by the International Copyright Act, within three months of its first publication in the foreign country.

(2.) The author must notify on the title-page of the original work, or if it is published in parts, on the title-page of the first part, or if there is no title-page, on some conspicuous part of the work, that it is his intention to reserve the right of translating it.

(3.) The translation sanctioned by the author, or a part thereof, must be published either in the country mentioned in the Order in Council by virtue of which it is to be protected, or in the British dominions, not later than one year after the registration, and deposit in the United Kingdom of the original work, and the whole of such translation must be published within three years of such registration and deposit.

(4.) Such translation must be registered, and a copy thereof deposited in the United Kingdom, within a time to be mentioned in that behalf in the order by which it is protected, and in the manner provided by the said International Copyright Act for the registration and deposit of original works.

(5.) In the case of books published in parts, each part of the original work must be registered and deposited in this country in the manner required by the International Copyright Act, within three months after the first publication thereof in the foreign country.

[1] 15 & 16 Vict. c. 12, §§ 2, 3.

(6.) In the case of dramatic pieces, the translation sanctioned by the author must be published within three calendar months of the registration of the original work.

(7.) The above requisitions apply to articles originally published in newspapers or periodicals, if the same be afterwards published in a separate form, but do not apply to such articles as originally published.[1]

95. All pirated copies of any works of literature or art wherein there is any subsisting copyright by virtue of the International Copyright Act, or of any Order in Council, and all unauthorized translations of any book or dramatic piece, are prohibited to be imported, except with a written authorization of the registered proprietor or his agent.

96. In virtue of the powers granted to Her Majesty by the International Copyright Act, Her Majesty's Government have concluded treaties of International Copyright with the following countries, and Orders in Council to that effect were accordingly issued on the following dates:—As to Prussia, on the 13th May, 1846; Saxony, 26th September, 1847; Brunswick, 24th April, 1847; Thuringian Union—including Saxe Weimar Eisenach, Saxe Altenburg, Saxe Coburg Gotha, Schwarzburg Rudolstadt, Schwarzburg Sondershausen, Reuss Greiz, Reuss Cobenstein, Reuss Ebersdorf, and Reuss Schleiz, 10th August, 1847; Hanover, 30th October, 1849; Oldenburg, 11th February, 1848; Anhalt Bernburg and Anhalt Coëthen, February, 1853; and France, 10th January, 1852. The convention between the United Kingdom and France was signed at Paris on November 3, 1851, and thereby the same benefit of copyright, now secured to works first published in the United Kingdom, applies within this country to works first published in France. A translator is also protected in respect of his own translation; but the first translator of any work does not acquire the exclusive right of translating that work, except in such cases and to the extent provided in conformity with the act already described, to enable her Majesty to carry into effect a convention with France on the subject of copyright.

[1] 15 & 16 Vict. c. 12, § 8.

CHAPTER V.

RESTRAINTS OF TRADE IN TIME OF WAR.

Section I.—NATURE OF INTERNATIONAL LAW.

97. After a period of forty years of peace, Europe witnesses once more those calamitous scenes of war, which turn the fields of industry and social advancement into an arena of mutual contention and devastation. Notwithstanding the lessons of experience, the immense sacrifices which war imposes, and the sudden check thereby given to all measures of progress, the ambition of princes, or political intrigues, periodically plunge nations into a state of war with each other. Nor are they arrested from the appeal to what Lord Bacon defined to be the highest trial of right,[1] by an impoverished exchequer, the exhaustion of the vitals of a nation, and the devotion of the flower of its people to destructive, instead of productive, pursuits. Owing to the extensive ignorance which prevails among the masses, to political disorganizations and social wrongs, and above all, to human passions, it will be a long time before war will be universally extinguished; yet much may be done to prevent its recurrence. "Let one," said one of the most illustrious moralists of the present century, "take up the question of war in its principles, and make the full weight of his moral severity rest upon it and all its abominations. Let another take up the question of war in its consequences, and bring his every power of graphical

[1] Bacon's Observations on a Libel, vol. iv. p. 345, ed. 1730.

description to the task of presenting an awakened public with an impressive detail of its cruelties and its horrors. Let another neutralize the poetry of war, and dismantle it of all those bewitching splendours which the hand of misguided genius has thrown over it. Let another teach the world a truer and more magnanimous path to national glory, than any country of the world has yet walked in. Let another tell, with irresistible argument, how the Christian ethics of a nation is at one with the Christian ethics of its humblest individual. Let another pour the light of modern speculation into the mysteries of trade, and prove that not a single war has been undertaken for any of its objects, where the millions, and the millions more, which were lavished on the cause have not all been cheated from us by the phantom of an imaginary interest."[1] It is thus that, slowly but surely, step by step, the prophetical future will be realized, when men shall "beat their swords into ploughshares, and their spears into pruning-hooks, and when nation shall not lift up sword against nation, neither shall they learn war any more."

98. Time was when a state of war was followed by an entire suppression of all laws of humanity and justice, when "victory made even the sacred things of the enemy profane, confiscated all his property, doomed him and his posterity to perpetual slavery, and dragged his kings and generals at the chariot-wheels of the conqueror." The introduction of international jurisprudence greatly modified these barbarous practices, and it succeeded in establishing a code of moral duties to govern the intercourse and contentions of independent States, which, though the work not of legislators but of scholars, has, within the last two centuries, received universal sanction. Unknown to the Greeks, with whom the terms

[1] From a Sermon on Peace, by the Rev. Thomas Chalmers, D.D. The moral influence of ministers of religion, if exercised in the advocacy of peace, would do much towards diminishing the causes of war, especially those undertaken under the specious pretext of the defence of, or for the purpose of advancing the interests of, Christianity. Unfortunately, religious controversy is too often the source of disturbance in foreign politics, and in social relations at home.

of foreigners and barbarians were synonymous in language, slightly shadowed by the institution of the *Collegium* and *Jus feciale* of the Romans, the first glimpses of international law dawned during the middle ages, when the Pope was acknowledged as the international judge and arbitrator in the convention of Christendom. With the progress of time, the combined influence of chivalry, commerce, learning, and religion, brought nations into closer contact with each other; and in the sixteenth century, their intercourse was consolidated by the system of maintaining reciprocally among the European sovereigns ordinary and resident embassies. To trace the history of international law, we should examine the modes of warfare before the introduction of the science, and the altered practice since the adoption of it by the respective States. But such an inquiry would be foreign to the object of the present work. The labours of Grotius and Puffendorf, of Vattel and Martens, of Bentham and Sir James Mackintosh, have acquired universal reputation; and no nation could with impunity infringe the precepts which these immortal writers have established, precepts derived from the example of ancient practice, the dictates of philosophy, the testimony of poets and orators, and the light of Divine revelation. A most comprehensive treatise on International Law has just appeared, by the learned Dr. Robert Phillimore, a work which combines the learning of the scholar, the enlarged views of the statesman, and the discriminating acumen of the jurist.[1]

Section II.—RIGHTS OF BELLIGERENTS.

99. War is the mode of settling a difference by means of arms between two nations, who recognise no common superior to whom the pacific settlement of the dispute may be submitted.[2] War is usually preceded by a declaration or manifesto, setting forth the origin and progress of the

[1] Commentaries on International Law, by Rob. Phillimore, M.P.

[2] Alb. Gentilis De Jure Belli, Comment. 1 in pr.

dispute, the steps taken to avert the impending calamity, and the motives for commencing hostilities. Such declaration is necessary, in order to fix the date from which the relations of the belligerent countries assume the new character consequent on a state of war. It was of ancient practice to notify such declaration to the enemy, prior to the actual commencement of hostilities; but, with the increased facilities for communication, it is now considered sufficient to give to such a document the necessary publicity in one's own State. It is not requisite that there be a declaration of war on both sides; if it be given on one side only it is sufficient to prove the existence of actual hostilities, and that puts the other party also in a state of war, though he may perhaps think proper to act on the defensive only.[1]

100. Sometimes, prior to declaration of war, an embargo is laid on the ships and other property of the offending nation found within the territory of the injured State. The seizure of property under such circumstances, although hostile in the mere execution, is but equivocal as to its effects, and liable to be varied by subsequent events. If the relations of peace are reestablished, then the seizure proves to be a mere embargo or temporary sequestration, and the property is restored; if a declaration, followed by actual war, takes place, then it has a retroactive effect, and the property is considered as having belonged to the enemy.[2]

101. The immediate effect of a declaration of war is to constitute the belligerent nations and governments collectively, and each individual respectively, as enemies to each other; for it is a rule of the law of nations, that when one sovereign declares war against another sovereign, it is understood that the entire nation declares war against the other nation. This principle, hitherto maintained by the law of nations, is in fact no more than a fiction of law; inasmuch as relations of trade, of families and of friendship, must still subsist, notwithstanding

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[1] The Eliza Ann, 1 Dod. 247, 4 Rob. 247.

[2] The Bœdes Lust, 5 Rob. 245. The Jerbruida, 2 Rob. 211.

the governments of the respective countries are at war against each other. The subjects of the belligerent States residing in each other's territory are considered as alien enemies, and as such cease to be protected: this, however, is subject to some modifications. By the ancient law of England it was provided that merchant strangers, in case of war between their prince and the king of England, shall have forty days' warning, by proclamation, to avoid the realm; and if they cannot do it by that time, by reason of some accident, they shall have forty days more, and in the mean time liberty to sell their merchandise. During these eighty days they have the king's protection.[1] The same rule prevails in the United States of America;[2] and Magna Charta[3] prescribed that foreign merchants, if their country was hostile, might be arrested till it was known how our merchants were treated in the alien country. This principle of reciprocity, in the treatment of foreigners in time of war, is still adhered to in this country.[4] By the law of nations, both persons and individual property are inviolable, both in time of peace and in time of war. Some international writers[5] laid down that debts due to the enemy might be confiscated; but such a right cannot be maintained, and the books do not furnish a single instance of the seizure of debts, or a decided case in the support of the legality of such a measure.[6] Moreover, a sovereign may force a debtor to pay him the debts due to the enemy, but that could never discharge the claim, against the consent of the creditor. During the late wars, no action could be maintained by an alien enemy, yet the right of the original creditor was not extinguished, but was only suspended during war, and was revived at the restoration of peace.[7]

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[1] 27 Edw. VI. c. 17. [2] Act of Congress, July 6, 1798, c. 73.

[3] This great charter of the liberties of England, which has become sacred in the memory of Englishmen, was extorted from King John, on the 15th June, 1215, and confirmed under the reign of Henry III. in 1223.

[4] The Santa Cruz, 1 Rob. 64. [5] Grotius, b. i. c. i. § 6; b. iii. c. viii. § 4.

[6] Wolff *v.* Oxhonlin, b. M. & S. 106.

[7] *Ex parte* Boussmaker, 13 Ves. Jun. 71. The Ann Green, 1 Gallis. 292.

According to a late decision, the plea of alien enemy was not admitted in the courts of law.[1] Public funds held by the enemy are also respected: it being a property entrusted to public faith, the duties which it imposes are not altered by the change of relations between the two States.

102. As soon as hostilities commence between two countries, a complete interruption of commercial intercourse follows; all trading with the public enemy being interdicted, and the property engaged in such trading liable to confiscation. Pending contracts, the performance of which is rendered unlawful by the government of the country, are dissolved on both sides.[2] Where operations have been entered into before the war commenced, and are in the act of being carried out, and the goods or ships are in actual transference, such trading would be an unintentional violation of the right of war, and the property if captured would be restored. So a vessel chartered before the declaration of war, would not be affected by subsequent hostilities; but in the case of a vessel chartered for an outward and homeward cargo before the commencement of hostilities, although the outward cargo would be protected, the homeward cargo would be liable to seizure.[3] The prohibition to trade with the enemy extends also to the prohibition of withdrawing goods purchased in the enemy's country after the declaration of war, without the licence.[4]

103. Notwithstanding all trade with the enemy has been uniformly prohibited in former wars, the British Government, during the present hostilities with Russia, by an order in Council, 15th April, 1854, granted permission to all British subjects, and the subjects or citizens of any neutral or friendly States, freely to trade with all ports and places wheresoever situated, which shall not be in a state of blockade; except

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[1] Chapeler *v.* Durrant, 23 L.T. 79 C.B.

[2] Barker *v.* Hudson, 3 M. & S. 273. Potts *v.* Bell, 8, T.R. 548. The Hoop, 1 Rob. 196.

[3] The Lady Jane, 1 Rob. 202. The Williams, ibid. 214.

[4] The Rapid, 8 Cranch, 155.

however that no British vessel can, under any circumstances, communicate with any port or places which belong to, or may be in possession or occupation of, her Majesty's enemies.[1]

Section III.—OF LICENCES.

104. The liberal principles sanctioned by the British Government during the present war with Russia, and the virtual abolition of the long-established doctrine of illegal trading with the enemy, have materially simplified the rules which will govern the relations of commerce in time of war. What was, in effect, conceded as privileges to individuals, has now been established as the general law of nations. Yet it may be important to detail the leading features of the system of carrying on trade in time of war by means of licences. It has at all times been found expedient to relinquish partially the prohibition to trade with the enemy, with a view to the advantage of certain kinds of trade which were indispensable to the wants of the country; but, in all cases, it is the sovereign alone who can authorize this partial suspension of the war; and, as licences are high acts of sovereignty, they must not be carried further than the intention of the great authority which grants them may be supposed to extend.[2] Still, licences are interpreted liberally, and, provided no fraud had been committed or meditated, as far as appeared, the parties would be entitled to the benefit of the protection, although the terms may not have been literally and strictly fulfilled.[3] In the construction of licences certain rules are generally followed; for example, when the licence is for importation on board a neutral vessel, it would make no difference if she be of another country than that designated in the licence, provided the different countries have the same political bearing to this kingdom.[4] But it would never be extended to the ship of the enemy, or to a British ship.[5] A licence granted to

[1] See Orders in Council, p. 100.
[2] The Cosmopolite, 4 Rob. 11.
[3] The Daukbarheit, 1 Dods. 187.
[4] Ibid.
[5] The Gute Hoffnung, 1 Dods. 251.

a British merchant cannot be extended to another, because it is a material object, in the discretion of government in granting such exemptions, to judge of the particular persons who are fit to be so entrusted.[1] Where a licence is obtained for certain enumerated articles, other articles not inserted in the licence, but sent at the same time, would not be protected; although, where there is a total absence of fraud, the licence might be held to cover the other articles also.[2]

105. If a licence be granted to go to an enemy's port in ballast, for bringing a cargo from thence to this country, that would not protect the vessel carrying a cargo to the port of the enemy.[3] Nor could a licence to trade with the enemy be used for another trade from one foreign port to another. No voluntary deviation from the course pointed out is tolerated: when the party is not within terms of the licence, the character of enemy revives, and the property would be subjected to confiscation.[4] It is the duty of the merchant resident in a hostile country, who wishes to trade with the ports of the kingdom, to state to the government, in a most full and explicit manner, the purposes of his voyage, and the place to which he intends to go; and it is then for her Majesty's Government, being put in possession of the plans and designs of the party, to decide whether it will permit such a course of proceedings. A licence never operates retrospectively; it looks to that which remains to be done, and extends its influence to future operations.[5] If the date of the licence is fraudulently altered, its validity is destroyed, even where the person claiming protection under it is innocent of the fraud.[6]

Section IV.—RIGHT OF SEARCH.

106. In order to prevent the enemy's ships escaping the vigilant eye of the belligerent cruisers,—to watch that other

[1] The Jonge Johannes, 4 Rob. 263.
[2] The Vriendschap, 4 Rob. 99. The Henrietta, 1 Dods. 174.
[3] The Catherine Maria, Edw. 337.
[4] The Europa, Edward, 342.
[5] The Vrow, 1 Dods 167.
[6] The Louisa Charlotte, 1 Dods. 308.

nations do not afford any illegal assistance to the enemy by carrying articles of war,—and with a view to exhaust their resources from, and to intercept their communication with, other States, the belligerents claim the right of searching and visiting any ship, to whatever State it may belong, whatever be its cargo, and whatever be its destination; for it does not appear what the ships, or the cargoes, or the destinations are, till they are visited and searched.[1] And neutral vessels would not be protected from the right of search by being under convoy of a man-of-war, unless it were mutually agreed by the respective governments that the presence of one of their armed ships along with their merchant vessels is understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality.

107. The custom is, that when a cruising vessel meets a neutral merchant vessel, she fires a gun, as a signal for the merchant vessel to stop and submit to the search. If the vessel summoned does not stop, the belligerent cruiser has a right to pursue it, and force it to the search. The belligerent cruiser then sends on board the ship for her papers;[2] and if he finds such vessel carrying a cargo composed of contraband goods, wholly or in part, to any ports of the enemy of the country, he has a right to detain it. The belligerent cruisers may also bring in, for a more deliberate inquiry than could be conducted at sea upon a number of vessels, even those which professed to carry cargoes with a neutral destination. If the merchant vessel offers no resistance to the right of search, then, where the nature of the goods and destination are not hostile, the vessel is restored. But if there was intention to resist, the penalty for the violent contravention of the right of search is the confiscation of the property.[3] In time of war, merchant vessels are supplied

[1] The Maria, 1 Rob. 360.

[2] The following are the papers and documents usually required: 1st, the passport; 2d, the register, the sea-letter; 3d, the muster-roll; 4th, the charter-party; 5th, the bill of lading; 6th, the invoices; 7th, the log-book; and 8th, the bill of health.

[3] The Maria, 1 Rob. 360.

with passports and certificates, describing the true names of the master of the vessel, ship's goods, and the ownership of them, and any other particulars; praying the governors of ports, commanders, generals, or whom the ship should chance to meet, to suffer such vessel to proceed, without molestation, detention, or impediment.

Section V.—RIGHT OF CAPTURE.

108. The capture of the merchant vessels and property of the subjects of the belligerent states is a measure resorted to with a view to destroying the national resources of the enemy, and inducing him thereby to come to terms of peace. This, however, is obtained at the expense of an infringement of the natural rights of individuals; the exercise of which not even war can interrupt. In operations of war by land, private property is respected: pillage has been entirely relinquished by civilized nations; but in maritime wars, the most flagrant violations of individual rights are still sanctioned. The inequality in the operation of the laws of war by land and by sea, has been mainly justified by alleging that, in maritime wars, the great object in view is the destruction of the enemy's commerce and navigation; whereas the objects of war by land are conquest, or the acquisition of territory, in which case the victor is naturally restrained from the exercise of his extreme rights. It may, however, be questioned whether, according to the dictates of international equity, the belligerents may invade the right of individuals to their own property during a time of war, on the plea that each individual subject of the enemy forms an integral part of the nation at war.[1]

109. The right of capture attaches on the ships of the enemy and their cargoes, being enemy's property. This right was formerly exercised even against the enemy's property found on board neutral vessels; and was maintained with

[1] Wheaton's International Law, p. 811.

considerable learning by British and foreign jurists. But its interference with the acknowledged right of neutrals was strenuously resisted by the European powers, and proved the fertile source of international disputes. "The vigilance of our cruisers and the acuteness of our lawyers were incessantly employed, in all former contests, in tracking out the faintest scent of enemy's property on board every vessel met at sea. The mercantile ingenuity of the country, pressed by the increased demands and exorbitant prices of prohibited articles, was strained to evade, by every species of fraud, these prohibitions; and a warfare was carried on within our courts of justice between the pitiless exaction of the laws of war, and the irresistible impulse of the laws of trade."[1] The principle of "free ship, free goods," has now been recognised by her Majesty's Government, and has been adopted by France and Russia.[2] A lawful capture cannot be resisted. Upon the

[1] "The Times," of 21st April, 1854.

[2] The great maritime question as to the rights of a belligerent of seizing the enemy's property in neutral vessels, and neutral property in the enemy's vessels, may be considered as definitely settled by the recent measures of the British and French governments; but as the principle possesses an historical interest, we shall briefly trace its progress. Omitting the brief allusions of the Roman law, *De Publicanis et Vectig.** &c., which have no direct reference to international rights, the oldest authority on the point is the "Consolato del Mare," which said, "If the captured ship belongs to a friend, and her cargo to an enemy, the cargo may be confiscated; but if the ship belongs to an enemy, and the cargo to a friend, the owner of the cargo may ransom the vessel." "Se la nave che pigliata sarà fosse di amici, e le mercanzie che lui porterà saranno d'inimici, l'ammiraglio della nave può forzare e costringere quel padrone di quella nave che lui pigliato averà, che lui con quella sua nave gli debba portare quello che de' suoi inimici sarà. Se la nave fosse d'inimici e il carico che nella detta nave sarà fosse di amici, i mercanti che nella detta nave saranno, e dei quali il detto carico fosse, tutto o in parte, si debbano accordare per conto della detta nave che di buona guerra è con il detto ammiraglio per alcun prezzo ragionevole come che loro potranno, e il detto ammiraglio debba fare tutto accordo e patto che ragionevole fosse e lui sopportare possa alla giusta ragione." (Cap. 273.) The word "amico" being intended as the friend of both parties, is equivalent to the modern word "neutral." These rules of the Consolato were generally followed during the twelfth and thirteenth centuries.

* Dig. lib. xxxix. tit. iv.

capture of a ship, the master and crew are not bound to navigate the vessel, and they owe no service whatever to the

The first two treaties on the subject are, one between Edward III. of England and the maritime towns of Castile and Biscay, in 1351; and the other between the same king and the maritime towns of Portugal, in 1353; both of which declared neutral property in the enemy's vessels to be free. In 1406, Henry IV. of England concluded a treaty with the Duke of Burgundy, which declared enemy's goods under a neutral flag to be confiscable. Several other treaties were entered into at this period between England and Genoa and Austria, some declaring enemy's goods under a neutral flag, others neutral goods under an enemy's flag, to be good prize. France had concluded as yet no treaties on the subject, but the edicts of 1543 and 1584 declared the same principles. In 1604, Henry IV. of France concluded a treaty with the Sultan Achmet, by which neutral goods under an enemy's flag were declared free, and equally so enemy's goods under a neutral flag. Similar treaties were entered into in 1612 between Holland and Turkey, and also between the regencies of Algiers, Tunis, and Tripoli, with Holland, Sweden, and Denmark. In 1634, England and Portugal concluded a treaty, declaring enemy's goods under a neutral flag to be free, but neutral goods under an enemy's flag to be confiscable. France, in 1646, by a treaty with Holland, stipulated the freedom of enemy's goods under a neutral flag; but the edict of 1650 confirmed the rigorous provisions of the ancient ordinances with respect to enemy's goods in a neutral vessel, whilst it modified them as to the goods of a friend in an enemy's vessel. The treaties entered into before and after the Peace of Westphalia in 1659, adopted as a rule the freedom of enemy's goods under a neutral flag, and the confiscation of neutral goods under an enemy's flag. Of these treaties we may notice that of 1650, between Spain and the United Provinces; of 1655, between France and the Hanseatic Towns; of 1655, between Cromwell and Louis XIV., and another between France and England in 1677; of 1656, between England and Sweden; the treaty of Westphalia of 1659; and the treaty of 1661, between Portugal and Holland. During this period, while so many treaties existed, adopting the principle, "free ship, free goods," two treaties were concluded containing provisions similar to those of the Consolato—one of 1661 between England and Sweden, and the other of 1664 between Sweden and Denmark. In 1665, England entered into a treaty with Spain which contained the principle, "free ship, free goods," and in all subsequent treaties with that country till 1783, the same principle was maintained. In 1667, the same principle was sanctioned in the treaty between Great Britain and the United Provinces, and was confirmed in the subsequent treaties till 1780. During the first half of the seventeenth century, the principle, "free ship, free goods," was all but universally adopted; but in the latter part of the seventeenth, and at the commencement of the eighteenth century, during the wars which took place between England, France, and Holland, far different rules prevailed regarding neutrals. The French ordinance of 1681 declared all ships loaded

captors. A ship cannot be captured in a neutral territory. A neutral territory cannot be made use of for any purposes

with enemy's goods, and the goods of friends found in an enemy's ship, to be good prize. Such rigorous rules were confirmed in 1692, and renewed during the wars of the Spanish succession. Spain also adopted the same rules in 1702 and 1718. In 1693, the first armed neutrality was concluded between Sweden and Denmark, to resist the execution of the convention between Holland and England to put a stop to all neutral trade with France. The commercial treaties of Utrecht in 1713 between England, France, Spain, and Holland, sanctioned the principle, "free ship, free goods;" and the seventeenth article of this treaty was repeated *verbatim* in the twenty-eighth article of the treaty of commerce of Versailles in 1786. By a treaty between France and the Hanseatic Towns in 1716, both enemy's goods in neutral vessels, and neutral goods in the enemy's vessels, were declared confiscable. But in a treaty with Holland in 1739, France restored the principle of the treaty of Utrecht. In 1751, the famous dispute arose between Great Britain and Prussia in respect to the seizure of certain Prussian ships with the enemy's goods on board, and it elicited the remarkable document transmitted by the Duke of Newcastle, which bore the signature of Geo. Lee, G. Paul, D. Ryder, and W. Murray.

During the war which occurred after 1740, the most rigorous rules regarding neutral navigation were reestablished by France; but, in 1756, that country opened to neutral powers the trade between France and the French Colonies, a right which Great Britain denied to neutrals. In 1776, the United States of America declared their independence; and in 1778 France entered into a treaty with them on the principle, "free ship, free goods," even where the whole or part of the cargo belonged to the enemy; and in furtherance of it, France passed regulations, modifying the previous rules of 1681, 1704, and 1744; but England did not follow her example, and continued to seize all vessels, Dutch, Danish, Russian, or Hanseatic. The Northern Powers determined to resist such an encroachment of the rights of neutrality; hence the formation of a second armed neutrality of 1780, first declared by Catherine II. of Russia, and soon responded to by Denmark, and a double treaty between Denmark and Sweden, and between Russia and Denmark.

The principles which this confederacy maintained were the following:—

I. That neutral ships might freely trade from port to port, and upon the coasts of nations at war.

II. That the property of the subjects of belligerent powers should be free on board neutral ships, excepting goods that were contraband.

The armed neutrality was afterwards strengthened by the accession of Holland, Prussia, France, Portugal, and the Two Sicilies. In 1783, the Peace of Paris was concluded, which confirmed the principle on which the armed neutrality was founded; and in the same year the United States entered into a treaty with Sweden, adopting "free ship, free goods." Other treaties were also concluded to the same effect between Russia and the Porte, in 1784; Prussia and the United States, in 1785; Russia and Austria, in 1785; France and Russia, and Prussia and the Two Sicilies, in 1787. The French Revolu-

which shall lead to immediate violence: no proximate acts of war are in any manner allowed to originate on neutral ground.

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tion of 1793 caused a complete change of policy on the part of the Northern Powers. Russia broke her treaty with France, and formed one with Great Britain, renewing the treaty of 1766; and by a decree of the French Convention, enemy's goods on board neutral vessels were declared to be good prizes. In 1795, the United States concluded a treaty with Great Britain, by which it was agreed that the property of enemies found on board neutral ships shall be taken from them. But again, in 1800, the United States and France formed a treaty, establishing the principle that free ships make free goods, but that neutral property in enemy's ships shall be good prize.

Another armed neutrality was made in 1800, for the recognition of the principle that free ships make free goods, by treaties between Russia, Sweden, Denmark, and Prussia; but this was suddenly ended by the murder of the Emperor of Russia. The death of Paul I. changed the policy of Russia; and a treaty was concluded between England and Russia in 1801, by which enemy's goods under a neutral flag were declared good prize. To this Denmark and Sweden acceded in 1801 and 1802. It would be in vain to follow the severe measures of hostility resorted to by the French and British governments during the French wars, brought to a close in 1815. Since the Peace, France and the United States have concluded numerous treaties with other countries, establishing the principle, "free ship, free goods." The treaties of France are—with Brazil, in 1826; with Bolivia, in 1837; with Ecuador and Venezuela, in 1843; with New Grenada, in 1846; with Guatemala, in 1848; with Costa Rica, in the same year; and with Hayti, in 1852. The Ottoman Porte has also engaged with France in 1604, with England in 1675, with Russia in 1783, and with other countries indirectly, not to confiscate any goods, except contraband of war, on board the ships of friendly nations. In so far, therefore, as treaties are authoritative in settling the principles of the law of nations, they are conclusive in establishing the principle that the belligerents have no right to seize the property of an enemy found in the ship of a neutral. It is contended, however, that, notwithstanding the numerous treaties formed to secure the recognition of this principle, the law of nations, as expounded by Gentilis, Grotius, Zouch, Loccenius, and Bynkershoek, is not affected by the exceptions introduced by treaties. But international writers themselves founded their doctrines on the established laws and usages of the civilized world at their respective periods, and these, expanded and liberalized with the progress of civilization, form, in progress of time, the basis of the treaties entered into between nations. Therefore, to produce the authority of the eminent writers on the law of nations as opposed to the more enlightened international relations of modern days, would be to stereotype rules, the practice of which, in many cases, would now be condemned by the civilized world. To render it incompetent for any nation to repeal *any* of the principles sanctioned by the jurists and statesmen of former ages, would be to arrest the law of progress in moral science. As to the authority of treaties, Rayneval said, "Les traités, n'importe leur contenu, ne constituent point le

But it belongs to the State to assert the right of its own territory against its violation.

110. A seizure may, under certain circumstances, be justifiable or unjustifiable. If it be justifiable, the captor is entitled to recover costs and damages from the claimants. If the prize be returned, but the capture was originally justifiable, the restitution would not exonerate the claimants from paying the costs. But if there were no sufficient ground of seizure, the claimants would be entitled to costs and damages. The captor is bound to use due diligence with regard to the property captured.[1] So if a prize-ship were lost by the misconduct of the prize-master, by his not taking a pilot on board or otherwise, the owner would be entitled to restitution in value. But captors are not responsible for losses occasioned by mere misfortune. They are authorized to take the prize to a convenient port, a port where the vessel may lie in safety, and of sufficient capacity to admit of her entering it without unloading the cargo; as bulk must not be broken.[2] If the property captured be restored, the claimant is entitled to receive the goods as per invoice, and if there be found any deficiency, he is entitled to compensation. If the captor knew that the ship was protected by a licence, either from its production, or from

droit des gens; ils sont l'expression de la volonté particulière des contractants; et le droit de gens est independant de cette volonté; ils ont la même nature que les contrats entre particuliers; mais à défaut de contrat, c'est la loi commune qui décide; et entre nations, la loi commune c'est le droit des gens."* The principle, "free ship, free goods," rests, however, on a solid foundation. The right of neutrals to trade in time of war with belligerents, is an indefeasible right of the law of nations; it rests on the inviolability of the neutral territory, a ship being regarded as the floating colony of the State to which she belongs. This was the position of Kübner, Huber, De Martens, Galiani, Jorio, and Rayneval. We hail, therefore, the recognition of the principle by the British and French governments. France renounced her presumed right of confiscating neutral property on board Russian ships, and England that of confiscating Russian property on board neutral ships. Russia has imitated the example, and henceforth this more just and liberal doctrine may be deemed as incorporated in the law of nations, and held as the rule of belligerents in any future wars.†

* Vol. i. p. 288. † See Speech of Sir W. Molesworth, "Times," July 5, 1854.

[1] The Williams, 6 Rob. 316. [2] The Wilhelmsberg, 5 Rob. 143.

other circumstances which ought to have satisfied him of its existence, he is liable to the whole extent of the mischief done. But if the existence of the licence was not disclosed to him by those whose duty it was to inform him, and he had no sufficient means to inform himself, then the captor would not be responsible.[1]

Section VI.—RIGHT OF BLOCKADE.

111. A blockade is a sort of circumvallation round a place, by which all foreign connexions and correspondence, as far as human force can effect it, is to be entirely cut off. It is a high act of sovereignty, and cannot be extended at will by the blockading force.[2] There are two sorts of blockade; one by simple fact only, the other by a notification accompanied with the fact.[3] A blockade should be intimated to neutral merchants; it may be notified in a public and solemn manner by declaration to foreign governments; or, when it commences *de facto*, notice may be given on the spot to those who come from a distance, and who may therefore be ignorant of the fact.[4] Much contention was created during the last wars by the attempt to establish what is called a paper blockade; the belligerent parties asserting the right to declare all shipping ports, and even the whole coast of the enemy's country, in a state of blockade. The armed neutrality of 1800 declared a blockade to exist only where, from the arrangements of the power which is attacking, with vessels stationary and sufficiently close, there is an evident danger in entering. An accidental change would not suspend the blockade;[5] it would be considered as legally existing, although the winds did occasionally blow off the blockading squadron. If, however, the squadron be driven off by a superior force, a new course of events arises, which may introduce a presumption in favour of the restoration of freedom of commerce.[6] The breach of a blockade subjects the property to confiscation.[7]

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[1] The St. Antonius, 1 Acton, 113. The Felicity, 2 Dods. 381.
[2] The Kenrick and Maria, 1 Rob. 152.
[3] The Neptunus, 1 Rob. 171.
[4] The Vrow Judith, 1 Rob. 153.
[5] The Columbia, 1 Rob. 156.
[6] The Hoffnung, 6 Rob. 118.
[7] 1 Rob. 156.

112. On the question of blockade three things must be proved: first, the existence of an actual blockade; secondly, the knowledge of the party; and, thirdly, some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade.[1] The circumstances which prove the existence of a blockade have already been stated. The knowledge of the party is presumed when a notification has been made to the foreign government, the effect of which is to include all the individuals of that nation; it being the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect.[2] A notification does not *propriâ vigore* bind any country but that to which it is addressed, yet in a reasonable time it must affect neighbouring States with knowledge.[3] When the blockaded place is in the Continent of Europe, where the different States have constant intelligence, ships would not be allowed to sail to it under pretence that they expected to receive information on the spot.[4] Ships must call somewhere to obtain information, and they cannot obtain it at the mouth of the blockaded port. There may be ignorance as to the continuation of the blockade. Where the blockade is one of simple fact only, it ceases with the fact itself; but where it is accompanied by public notification, the blockade is supposed to exist till it has been publicly repealed. In the former case, the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination. But when it is by notification, till notice has been given, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete.

113. The object of a blockade is not merely to prevent an importation of supplies, but to cut off all communication of commerce with the blockaded place; and this blockade is just as much violated by a vessel passing outwards as inwards.

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[1] The Betsey, 1 Rob. 92.
[2] The Neptunus, 1 Rob. 171.
[3] The Adelaide, 2 Rob. 111.
[4] The Betsey, 1 Rob. 335 note.

Nothing but an absolute and unavoidable necessity will justify the attempt to enter a blockaded port.[1] A neutral vessel cannot enter a blockaded place; if she had already entered it before the commencement of the blockade, and had laden a cargo, she may retire with it; but no more purchases are allowed to be made in that port: the cargo must have been purchased before the port was put in a state of blockade. If the cargo be taken on board afterwards, it is a fraudulent act, and a violation of the blockade.[2]

Section VII.—Rights and Duties of Neutrals.

114. Neutrals are those who take no part in the hostilities, who are impartial with respect to both belligerents, and continue their accustomed trade without affording any succours or privileges to either party. The right of neutrals to trade with the enemy was often contested, but the principle is universally admitted. A limitation was introduced during the war in 1756, not to allow neutral vessels to trade between the mother country and the colony of the enemy, inasmuch as such a trade would be closed to a neutral but for the war. The same restriction applies also to the coasting trade. Such trading is so peculiarly national, that a neutral would at once be invested with the national character of the enemy if she were found engaged in it. But our courts have never condemned the ships to confiscation on that account, unless they carry on that trade with false papers.[3] Neutrality and impartiality must also be manifested by avoiding to become an auxiliary to any of the belligerents, by carrying articles which are contraband of war. The articles included under the denomination of contraband of war have often been stipulated by treaties. Certain articles, beyond the quantities necessary for the use of the ship, are of a direct and immediate use in war, such as cannons, mortars,

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[1] The Neptunus, 2 Rob. 115. The Hurtige Hane, 2 Rob. 127.

[2] The Betsey, 1 Rob. 94.

[3] The Johanna Tholen, 6 Rob. 78.

muskets, fire-arms, pistols, bombs, grenades, bullets, balls, flints, matches, powder, saltpetre, sulphur, pikes, flints, swords, belts, cartouche-boxes, also cuirasses, saddles and bridles. Other articles are used both in time of peace and in time of war. Horses have by many treaties been considered as liable to confiscation. Naval stores are declared contraband. Pitch and tar have been condemned as such, except where these articles are the produce of the claimant's country and constitute its ordinary commerce. Unmanufactured articles are looked upon with more indulgence than manufactured ones; so iron is more favourably considered than anchors; hemp than cordage; and wheat is not considered as so obnoxious a commodity as any of the final preparations of it for human use.

115. Provisions generally are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it.[1] With respect to provisions, a right of preemption may be exercised; that is, the belligerent may assume the right to intercept the delivery of the cargo, and to purchase it at a price calculated exactly in the same manner and at the same value as it would have done if it had arrived at its port of destination in the ordinary course of trade. No freight can be claimed on contraband goods,[2] but the vessel is not thereby subject to capture; where, however, the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other aggravating circumstances, the ship would be liable to confiscation. If the owner of the cargo has any interest in the ship, he is thereby concerned in the illegal transaction, and the whole of his property will be involved in the same sentence of condemnation.[3] This right of confiscation of contraband goods and vessels is much modified by treaties.

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[1] The Jonge Margaretha, 1 Rob. 193.
The Mercurius, 1 Rob. 288. The Regende Jacob, 1 Rob. 92.

[3] The Jonge Tobias, 1 Rob. 330.

ORDER IN COUNCIL *in furtherance of Her Majesty's Declaration of the 28th March, 1854, respecting the Trade of Neutrals and British Subjects, 15th April, 1854.*

WHEREAS Her Majesty was graciously pleased, on the twenty-eighth day of March last, to issue her royal declaration in the following terms:—

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

"To preserve the commerce of neutrals from all unnecessary obstruction, her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

"It is impossible for her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches; and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

"But her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

"It is not her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships; and her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers."

Now it is this day ordered, by and with the advice of her Privy Council, that all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in her Majesty's dominions all goods and merchandise whatsoever, to whomsoever the same may belong; and to export from any port or place in her Majesty's dominions to any port not blockaded, any cargo of goods, not being contraband of war, or not requiring a special permission, to whomsoever the same may belong.

And her Majesty is further pleased, by and with the advice of her Privy Council, to order, and it is hereby further ordered, that, save and except only as aforesaid, all the subjects of her Majesty, and the subjects or citizens of any neutral or friendly State, shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate which shall not be in a state of blockade, save and except that no British vessel shall under any circumstances whatsoever, either under or by virtue of this order or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to, or be in the possession or occupation of, her Majesty's enemies.

And the Right Honourable the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, the Lord Warden of the Cinque Ports, and her Majesty's Principal Secretary of State for War and the Colonies, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.

BOOK III.

MERCANTILE CONTRACTS.

CHAPTER I.—OF CONTRACTS.

SECTION I.—NATURE OF CONTRACT.

116. IT is important, before entering into an exposition of the distinctive branches of mercantile contracts, to ascertain the leading principles of the law of contracts generally. A contract is an agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages, upon certain considerations to the other, to give some particular things, or to do or abstain from doing some particular act.[1] The essentials of a contract are, the consent, the capacity of the parties, the subject matter, the lawfulness of the contract itself, and the consideration. A contract is called *synalagmatic*, when two persons reciprocally bind themselves one towards another; *unilateral*, when one only or more persons bind themselves to another, without any corresponding obligation on the part of the other.

SECTION II.—THE CONSENT.

117. The consent would not be valid if given under an error, or if extorted by violence, surprise, or fraud. A consent may be expressed, implied, or tacit; it may be given by word or by writing; nor is it necessary to be drawn up in any form. It may also result from a correspondence. The consent, when proceeding from a correspondence, gives rise to the question already propounded with respect to the place, as to the time when the consent is deemed to perfect the con-

[1] Pothier on Obligations, § 3. Addison on Contracts, p. 1.

tract. Suppose an offer is made of goods at a certain price, and the correspondent writes by return of post accepting the offer: is the contract perfected as soon as the answer is written, or not till the answer is received? It is a rule, that until the terms of the contract are mutually and finally agreed upon, either party may retract. The party making the offer could not remain bound by it whilst the letter is forwarded, because during that time there is no mutual agreement; but when the letter containing the acceptance reaches him, then, if he have not retracted his offer, the acceptance becomes simultaneous with the offer, and the contract is perfected. If, however, there be a custom of trade, or it was expressly intimated in the letter conveying the offer, that the offer is binding provided it be accepted by return of post, then the party offering is considered as making, during every instant of the time the letter is travelling, the same identical offer; and the moment the offer is accepted, it entitles the buyer to recover in an action for not completing the contract.[1]

118. Another difficulty in the consent is the following: Suppose I offer to sell 100 bales of cotton; an answer is sent to me accepting 50 bales only: am I bound for the 50? Clearly not. There may be many reasons why I would sell 100 bales, and not 50 only. The disagreement does not consist in the quantity, but in the subject matter of the contract. Again, suppose I write to *A* a letter, with an offer to sell 100 bales of cotton, at 5*d.* per lb., and a letter with an offer to purchase the same at 5½*d.* per lb. is addressed by *A* to me: in this case *A*'s offer would be deemed a complete consent to my terms, the less being included in the greater. A tacit consent may sometimes be inferred by the acts of the party; for example, if, upon notice of abandonment, the insurer gave no answer, but sent instructions to the spot with respect to the property abandoned, there would be a tacit consent to the abandonment. If a cheque be presented to a banker, and he retains it beyond a certain time, it would be construed as an acceptance; generally, however, silence does not imply

[1] Adam *v.* Lindsell, 1 B. & Ald. 681.

consent. There are cases when, if a person should not answer a letter of advice, it would be deemed an approval. For instance, if I send goods to one with whom I am in regular correspondence, and forward to him the bills of lading for them; some days after, I inform him I am about to draw upon him for the price; if he does not answer this letter, it is tantamount to a consent to such draft. But if, on the contrary, I were to write to one with whom I never had business, announcing a draft made upon him, his silence would not imply his consent. In mercantile intercourse, it is the duty of a party who refuses the acceptance of an offer, or to perform an act, or to give effect to any contract, to express his dissent. This is especially required where there is a regular commercial intercourse between the parties.

119. As already stated, the consent would not be valid if given in error. There may be an error in the *motives* which induce a person to the transaction, in the *nature* of the transaction, in the *thing* itself, or in the *person*. An error in the motives never avoids the contract, unless it rests on the consideration for the contract; as, for example, a third person need not inquire why a party puts his name on a bill of exchange, whatever may be the acceptor's rights towards the other contracting party. If there be an error in the nature of the transaction, the contract will be void; but if the error consist only in the accidental qualities of the thing, it would not annul the contract; the error must rest on the very identity of the thing: unless, indeed, the accidental qualities of the article form the most essential conditions of the contract. In the contract of insurance, the error in the nature of the risk, or in the circumstances attending it, produced either by misrepresentation or concealment, would vitiate the contract. The error in the person is often material; cash transactions would not be affected by such an error, but if, after a person deals with one on credit, he finds that another was the contracting party, the sale would be void.

120. In certain trades, where all contracts are made through brokers, although it is understood that brokers never pur-

chase on their own account, and that they generally deal on account of numerous principals, yet they do not declare the name of the principal in their purchases. We shall enter fully into this subject when treating on the law of Principal and Agent; it is enough for the present to say, that when the name of the person on whose account the broker contracted is not mentioned, the broker dealing in his own name, unless protected by special customs, will be personally responsible. If a consent were given under distress or restraint, it would be void; and also when it has been given by fraud or deceit. It must be observed, however, that in all these cases the contract is not of itself void, but there is ground for an action for damages, or for annulling the contract.

Section III.—THE CAPACITY OF THE PARTIES, SUBJECT MATTER, AND CONSIDERATION.

121. We have already observed the natural and artificial disabilities which affect minors, married females, ecclesiastics, and aliens;[1] it is not requisite, therefore, to refer to the subject under this head. The subject matter of the contract may be any thing. It may be corporeal or incorporeal; it may be goods, bills, good-will, share, stock, anything having a value; a thing future or a thing present; even an expectation, provided it be certain or ascertainable, and provided it be lawful. Whatever is contrary to justice, morality, statute law or public policy, is void, and cannot be supported in any court of law or equity. But illegality is never presumed; on the contrary, everything is always presumed to be legal unless the contrary be proved.

122. There must be a consideration for a promise: wherever the undertaking is gratuitous, it creates no legal responsibility. A consideration must be of some value, however slight. A difference is made between a good consideration and a valuable consideration. To give a right of action as

[1] See pp. 42—48.

between the parties, it is enough if there be a *good* consideration; but to render it good, even against third parties, the consideration must be *valuable*. A consideration will be sufficient when the party promising obtained some benefit for such a promise, or even when a third person was thereby benefited; and also when the party to whom the promise is made subjects himself to any charge or obligation, or to some inconvenience.[1] For example, if I have a clear claim upon you, and I consent to forbear it, that would be a sufficient consideration for a promise you may make.[2] Moreover, a consideration, as the contract itself, must be lawful, and not against law, sound policy, or good morals.[3] The consideration required in bills of exchange, and other contracts, will be separately considered in the proper place.

Section IV.—FORM OF THE CONTRACT.

123. No special form is needed for a mercantile contract, except that, in England, by the statute of frauds, all contracts for the sale and purchase of any goods above the value of 10*l.* must be in writing, the requisites of which will be detailed under the head of Contract of Sale.[4] Few contracts are drawn up by formal deed: a deed is a contract in writing, signed, sealed, and delivered. The sealing of a deed is a very ancient eastern custom. Scriptural records afford repeated instances of its uses; thus, in Nehemiah[5] it is said, "And because of all this, we make a sure covenant, and write it; and our princes, Levites, and priests, seal unto it." So Jeremiah,[6] speaking of a contract of land, said, "And I bought the field of Hanameel, my uncle's son, that was in Anathoth, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances.

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[1] Jones *v.* Ashburnham, 4 East. 455.

[2] Morton *v.* Burn, 2 Nev. & Perry, 297.

[3] Reg. *v.* Inh. of Northwingfield, 1 B. & Ad. 913.

[4] 29 Car. II. c. 3, § 17. [5] Nehem. ix. 38. [6] Jer. xxxii. 9—11.

So I took the evidence of the purchase, both that which was sealed according to the law and custom, and that which was open." Sealing is now one of the requisites of deeds, and must be made after the deed has been written, and before it is delivered; it must also be attested by witnesses, to establish the fact of the sealing, and to acknowledge the performance of all that is requisite for the validity of the instrument. Any material alteration in a deed, whether made by the party holding it, or by a stranger, renders the instrument altogether void from the time when such alteration is made. In order that a contract may have a legal validity, it must be duly stamped. The stamp duties vary according to the nature of the instrument, and to the length of the same. Stamps are required for deeds, sales of land, charter-parties, bills of exchange, policies of insurance, specific agreements, written contracts, and other mercantile instruments.

124. All written instruments are construed according to their natural sense and meaning, as collected, in the first place, from the terms used in them; which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of the trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or, unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in the same other special and peculiar sense.[1] As to the admissibility of parole evidence, in the first instance, where a written contract has been entered into, no parole evidence can be introduced to show that the agreement was in reality different from that which it purports to be;[2] or to add to, or alter, or contradict what is written. Evidence is admissible where words have an ambiguous meaning: where they may apply to two different things, then

[1] *Per* Lord Ellenborough, Robertson *v.* French, 4 East. 137. Mallan *v.* May, 13 M. & W. 511. Lee *v.* Stone, 1 Exch. 687.

[2] Williams *v.* Jones, 5 B & C. 109.

it may be shown which of them was the thing intended.[1] So where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible, for the purpose of applying the instrument to its proper subject matter. And conformably with these principles, the courts have allowed mercantile instruments to be expounded according to the custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters.[2]

Section V.—Limitation of Action.

125. The exercise of the right of action for the fulfilment of a contract, or for the payment of a debt, is limited by statute within certain specific periods, according to the nature of the claim and the document on which it is founded. One of the principal reasons for admitting such limitations is the difficulty of ascertaining the facts necessary to make it safe to exercise the judicial power.[3] If the claim rests on a document under seal, or on a judgment, unless there be an acknowledgment or part-payment, the remedy would be extinguished at the end of twenty years; if it rests on a document not under seal, or on a verbal contract, the claim may be enforced till the end of six years only,[4] except in cases of disability. Yet, by the English law, this limitation does not extinguish the debt; it only gives right to the debtor to produce this limitation in bar of the claim; therefore, if the creditor has in his hands any property of the debtor, he has still a right of lien on such property. By the law of Scotland, however, while all legal remedy to enforce payment of a debt does not cease until the end of forty years from the time at which the right to sue first accrues, at the end of that period the debt is altogether extinguished. In the case of book-debts and merchants' accounts, there is prescription after three years; in

[1] Smith *v.* Jeffreys, 15 M. & W. 562.

[2] Starkie on Evidence, p. 1033. Smith *v.* Wilson, 3 B. & Ad. 733.

[3] Wedderburn *v.* Wedderburn, 4 My. & C. 41.

[4] 21 Jas. I. c. 16, § 3, for England; 10 Car. I. sess. 2, c. 6, for Ireland.

the case of bargains as to moveables not running into account, after five years; and in bills of exchange, after six years. In these cases the debt is not extinguished, but the parole proof, bills of exchange, and writings not attested, although not holograph, cease to be available at the end of the respective periods.

126. In order to put a claim out of the statute of limitation, the acknowledgment of the debt must be in writing, and must contain a promise, express or implied, to pay the debt.[1] In Scotland it is not requisite that the acknowledgment should contain a promise to pay, but it must be made after the period of short prescription is completed; if it be made within the time, it would not elude prescription. In England, such acknowledgment must be signed by the party to be charged thereby, and the signature of his agent would be insufficient; but in Scotland the acknowledgment would be valid, even where clearly made by the agent of the debtor. Moreover, in England the acknowledgment must be made to the creditor or his agent;[2] while in Scotland it is not indispensable that the acknowledgment should be so made. Certain disabilities, arising from the absence of the creditor or debtor, may prevent the commencement of the period of limitation; although in Scotland such absence, if voluntary, would not be a valid answer to a plea of prescription. A minor has six years after attaining majority in which to enforce his claims.[3]

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[1] 9 Geo. IV. c. 14, § 1. Hart *v.* Prendergast, 14 M. & W. 741.

[2] Holland *v.* Clark, 1 Y. & C. C. 151.

[3] See the queries issued by the Mercantile Law Commission, on the differences between the mercantile law of England and Scotland (1854).

CHAPTER II.

OF PARTNERSHIP.

Section I.—CONSTITUTION OF PARTNERSHIP.

127. Vast mercantile transactions, the field of which is so enlarged by increased facilities for communication and the expanded wants of the civilized world, require an amount of capital, a variety of talents and industry, and an extent of credit, seldom at the command of any single individual. Therefore contracts of partnership are formed with a view to associate capital and labour, consisting of two or more persons having a joint capital, and each being interested in the profit and losses. The contract is of ancient origin: it was known to the Romans, and in the middle ages it formed the basis of those great associations or leagues, which for a considerable period monopolized the commerce of Europe. In the consideration of this contract, we shall first examine the constitution of common or private partnerships, and the rights and duties of partners among themselves, and towards third persons. We shall afterwards enter into that more enlarged form of associations for commercial purposes, viz. joint-stock companies, including those for banking; and define the legal position of open or regulated companies, as well as of the civic companies or corporations. The doctrines of the English law respecting partnership will, in their most important bearings, be compared with the provisions of foreign law.

128. Partnership is created by an agreement, whereby two or more competent persons place, or bind themselves to place, something in common for the purpose of a common lawful

undertaking, and the acquisition of common lawful profits, of which they bind themselves mutually to account. The essential ingredients of this definition are,—

(1.) It is an agreement formed by the consent of the parties, and not a community of interests created by the operation of law. A community of interests may exist in cases of joint-tenancy in lands or goods, as in the case of joint-heirs and joint-legatees, or in the case of part-owners of a ship: these have all a joint-interest in the land or ship, but they are not partners on that account. So where a broker purchases a cargo of goods for several persons, they would all alike be interested in the purchase, but each would have a distinct interest for his own share. A community of interests does not necessarily constitute partnership.[1]

(2.) Each party must bring something. It may be in different proportions and in different kinds, but each must bring something valuable. It may be stock or effects, or labour or skill, or any other thing.[2] And what is brought by all the partners respectively, becomes the joint and undivided property of them all: it becomes a common stock, in which all of them have an equal interest.

(3.) The partnership must be formed for a lawful undertaking.[3] The contract must be legal in itself. A partnership formed for stealing, or smuggling, or any other immoral object, would not be valid. The trade must also be consistent with the law of the land.

(4.) The profits must be in common, although they may be distributed in unequal proportions.

(5.) The partnership must be constituted *bonâ fide*, and the concurrence of each partner must proceed from a full knowledge of all the circumstances and conditions of the partnership.[4]

(6.) It may be formed by express or implied consent, by

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[1] Hoare *v.* Dawes, Doug. 371. Coope *v.* Eyre, 1 H. Bl. 37. Gibson *v.* Lupton, 9 Bing, 297.

[2] Dale *v.* Hamilton, 5 Hare, 393.

[3] Bensley *v.* Bignold, 5 B. & Ald. 335.
Nye *v.* Beale, 18 L. T., 270 Q. B.

written articles, by parole contract, or by the acts of the parties.

(7.) Each partner must have free access to all the books and accounts.

129. A contract of partnership is founded on and perfected by the consent of the parties; therefore a third person could not be introduced into it after it has been formed, without the express concurrence of all the partners. The dissent of a single partner would be sufficient to exclude him. Hence it occurs that when a partner dies, the partnership is *ipso facto* dissolved, and, unless by specific provisions in the deed, the heir or assignee of the deceased partner would have no right to succeed him in the partnership.[1] As to what constitutes partnership, when two parties have a joint and mutual interest in a thing and in the profits thereof, they are deemed partners towards each other. The great *indicia* as to the existence of partnership being a community of profit and loss, no partnership can exist without a joint and mutual interest in the profits. Where there is only a community of interests, there would be no partnership. For example, two persons may agree to purchase goods on their joint account, without intention to sell them for common profit; and whether they purchase them in their joint names, or in the name of one of them, or through a broker, this will not make them partners.[2]

130. The numerous decisions relating to the question as to what constitutes partnership between the parties and towards third persons, have considerably complicated a principle otherwise clear. *Between the parties themselves a partnership exists only when such is their actual intention:* a mere participation of profits will not make the parties partners, as between themselves. Where a person receives out of the profits of a business the wages of labour, or a commission as hired servant or agent, such as a factor, foreman, clerk, or manager, having no interest or property in the capital stock of the

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Crawshay *v.* Maule, 1 Swanst. 508. Downs *v.* Collins, 6 Hare, 418.

[2] Coope *v.* Eyre, 1 H. Bl. 48. Hoare *v.* Dawes, Doug. 371. Barry *v.* Nesham, 16 L. I. C. P. 41.

business, the contract will be one of hiring and service; and he will not be a partner, although his wages may be calculated according to a fluctuating standard, and may rise and fall with the accruing profits.[1]

131. But although an agreement to participate in the profit and loss may be one of agency as between the parties, it may under certain circumstances be held to be one of partnership with respect to third persons, and the agent would acquire the responsibility of a partner. For instance: *A*, the sole owner of a lighter, entered into an agreement with *B*, a lighterman, that *B* should work the lighter, and that the net profit made should be equally divided between them. In this case *A* and *B* are held to be partners in the concern, and *B* as well as *A* would be liable for the repairs done to the lighter. Although there is no community of interest in the lighter, yet there is a community of interest in the profit and loss, which are to be divided as between principals; and that is sufficient to constitute a partnership.[2] So where a merchant employed a broker to purchase goods on speculation, and agreed to allow him a proportion of the profits arising from the sale, as a remuneration for his trouble and by way of brokerage, and that he should also bear a proportion of the losses; though the broker stood in relation of agent towards the merchant, yet as to third persons he was liable as a partner.[3] Again, an agreement by which a clerk is allowed a fixed annual salary in consideration of his general services in the business, and in addition to this a certain share of the net profit, that would constitute a partnership:[4] if a man, as a reward for his labour, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportionate to those profits, he is as to third persons a partner, and no arrangement between the parties themselves can prevent it.[5] It has been held that

[1] Stocker *v.* Brocklebank, 3 M. & G. 250. Meyer *v.* Sharpe, 5 Taunt. 74. Mair *v.* Glennie, 4 M. & S. 240. Rawlinson *v.* Clarke, 15 M. & W. 292.

[2] Dry *v.* Boswell, 1 Camp. 329. Bond *v.* Pittard, 3 M. W. 357.

[3] Smith *v.* Watson, 2 B. & C. 403. Muirhead *v.* Salter, 4 B. & A. 667.

[4] Katch *v.* Schenck, 18 L. T. Chancery, 386.

[5] *Ex parte* Rowlandson, 1 Rose, 91.

a partnership would not exist as between themselves and toward third persons, where the agent is to receive, not a specified proportion of the profits in specie, *but a sum of money calculated in proportion to a given quantum of the profits*, and fluctuating with them; nor would there be a partnership among themselves even if a trader agreed to pay another person for his labour in the concern, a sum of money in proportion to the profits equal to a certain share.[1] But such subtlety of distinctions are calculated to introduce confusion in the contracts between principals and agents, without in many cases preventing the latter from incurring that responsibility which the law imposes on those who participate in the *net* profit of the business.

132. In the instances already alluded to, a partnership would be held to have existed between the parties and toward third persons, where there was a participation in the net profits of the concern. If however *B*, the lighterman, as in the case already referred to, in consideration of working the lighter, should receive half the gross earnings, that would not constitute a partnership;[2] so if a captain of a ship employed in the whale fishery agrees with the sailors, that in lieu of wages they shall have a share of the produce of the cargo, that would not make them partners.[3] The meaning of the shipping contract is, that the men shall be paid out of the proceeds in a stipulated proportion: it is an agreement as to the mode of compensation, and gives them no property in the oil. In the case of Cornish miners, it is usual for gangs of miners to contract with the agent who represents the owner of the mine, to work a certain portion of a vein and fit the ore for market, at the price of so much in the pound of the sum for which the ore is sold.

133. The state of the law on this subject is productive of injurious results, it being a not uncommon practice to grant to

[1] *Ex parte* Hamper, 17 Ves. 404. *Ex parte* Rowlandson, 19 Ves. 461. *Ex parte* Langdale, 18 Ves. 300.

[2] Dry *v.* Boswell, 1 Camp. 329. Pott *v.* Eyton, 3 Com. B. 32.

[3] Wilkinson *v.* Frazier, 4 Esp. 441. Evans *v.* Bennett, 1 Camp. 300.

clerks an interest in the profits, in addition to a fixed salary. The principle of associating the employed in the interest of the concern would be extensively adopted, were it not for the obstructions put to it by the present state of the law; whilst the increase of intelligence and resources of the working classes demand that every facility should be afforded for the carrying out of such arrangements. The more direct is the interest of the parties who labour in the prosecution of an adventure, the more successful it is likely to prove, from the greater energy which it will call forth; while, by affording them a personal responsibility in the concern, it will have the effect, also, of fostering a character of independence and moral elevation amongst those who, by their talents, application, and frugality, are enabled to occupy positions of importance.

134. An agreement to participate in profit and loss may either render the property of the concern the joint stock of the firm, or it may be so framed as to allow it to remain the separate property of either party: in other words, there may be a community of interest in the profits, and not in the property.[1] Where, however, the transaction is a joint one, and is treated by the parties as a joint account and joint speculation, there would be a community of interest in the property itself, and each partner would have the disposal of it; even if one of the parties contributed all the capital, and the other his time and labour only. If, for example, a broker were to purchase 1,000 bales of cotton, being interested therein and acting in the business free of commission, and treating it as a joint transaction, although the whole amount was disbursed by the principal, the broker would acquire a complete right of disposal over the cotton as a partner.[2]

135. A community of profit and loss is sufficient to bind the parties as partners towards third persons. By a stern principle of the English law, the responsibility of partners is charged upon all who participate in the profit and loss, notwithstanding their names never appeared, and the parties

[1] Wish *v.* Small, 1 Camp. 331. Mair *v.* Glennie, 4 M. & S. 240.

[2] Reid *v.* Hollinshead, 4 B. & C. 878. Meyer *v.* Sharpe, 5 Taunt. 74.

who trusted the concern never knew that there were others who had an interest in the business. Nay more, however small the proportion in which any of the partners participate in the profits—however far it be from the intention of the parties to constitute a partnership among themselves—a community of interest in the profits renders each party liable for the debts of the other. *A* and *B*, ship agents, one residing at Cowes, and the other at Gosport, agreed to assist each other in procuring agencies, with a view to divide among themselves the profits of their respective commissions. They also engaged that each party shall respectively run the risk and sustain any loss in respect of any ship under his own immediate care, and that neither of them shall in any degree be answerable for the acts of the other. The Cowes house failed, and the creditor of that house sued the Gosport house for the debt: was the Gosport house responsible for the other? It was quite clear that *A* and *B* never meant to be partners, that they had no idea that either was to be involved in the consequences of the failure of the other, and that they did not understand themselves to be mutually responsible for any losses that might happen to either: yet it was decided that such an agreement would only be valid as between themselves; but with respect to third persons, they constituted themselves partners. The law on this subject is founded on the principle that he who takes a portion of all profits independently, takes from the creditors a part of that fund which is the proper security to them for the payment of their debt, and therefore he becomes liable to third persons to losses, if losses arise.[1] Another class of cases, resulting from the same

[1] Waugh *v.* Carver, 2 H. Bl. 235. Grace *v.* Smith, 2 H. Bl. 299. Barry *v.* Nesham, 3 C. B. 641. Cheap *v.* Cramond, 4 B. & Ald. 663. See the evidence of Mr. Commissioner Fane, before the Committee of the House of Commons, on the Law of Partnership, 1851, p. 73. It has been questioned whether the participation of profits in a mercantile concern, without interfering in the management of it, is sufficient of itself to constitute a partnership. Allowing that the portion of the funds thus subtracted from the partnership may so far reduce the assets of the house, would it not have the same effect should an equal amount be paid by the partnership in the shape of interest for loans,

principle of the English law, is, where a person leaves a certain sum in the concern of a partnership, with a view to receive an annuity out of the profits. Retiring partners would often prefer not to withdraw the whole of their capital from the concern, with a view to obtain a rate of interest varying with the profits; but such would be accounted a participation in the profits, and would charge them with the liabilities of partners. In such cases, the criterion to determine whether the relation be one of partnership or not, is, whether the annuity was of a certain or of an uncertain amount; whether the profit or premium was certain and defined, or casual, indefinite, and depending on the accidents of trade. If the annuity is fixed, the retiring partner will be considered a lender of money; if contingent on the profits, he will be a partner.[1]

Section II.—WHO MAY BE A PARTNER.

136. Every person of age, of sound mind, and under no legal disability, may enter into a contract of partnership. A minor may be a partner, and be entitled to all the benefits resulting from the partnership; though he will not be liable

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which might at any time be withdrawn? Or again, if it be the participation of profits which constitutes a person a partner, any party realizing profits from business transactions with such house may be said to have participated in the profits. If it be not the participation in the profits, but the right which such participation might give to the examination of the accounts as principal, that may affect the parties among themselves, and not third persons. With respect to third persons, the principle upon which credit is granted is not the knowledge that any person, beyond those whom they trust, have any interest in the business, and against whom, under any circumstances, they may proceed, but it is the character, known conduct, and honesty of the parties themselves, the mode of management of the concern, the capital which is known to have been embarked in it, and the success of the business which the house has undertaken. Such is the true foundation of credit, which seems to subvert the whole liability of dormant partners. The recognition of this principle would remove the principal hindrances to the carrying out of satisfactory arrangements for the association of capital and labour.

[1] Grace *v.* Smith, 2 W. Bl. 998. *Ex parte* Wilson, Buck, 48. *Ex parte* Chuck, 8 Bing. 469. Gilpin *v.* Enderby, 5 B. & Ald. 963. Elgie *v.* Webster, 5 M. & W. 518.

for the losses, nor be responsible for the debts contracted during his infancy while he is a partner, if he choose to take advantage of it. As it has already been observed, the acts of the minor are not absolutely void, but voidable. A minor being a partner may, when he comes of age, elect if he will continue that partnership or not. If he continues the partnership, he will then be liable as a partner; but if when of age he intends to dissolve the partnership, and takes proper means to let the world know that the partnership is dissolved, then he will cease to be a partner. If, on the contrary, he allows the time to elapse when he could disaffirm acts done under infancy, and no notice be given by him to dissolve the partnership, then the contract, which was voidable only in the first instance, becomes absolute, and he becomes responsible for all the debts contracted by the firm before and after he became of age.[1]

137. Married women are incapable of forming a partnership, and they are disabled generally to contract. If, by consent of their husbands, they possess shares in a banking company or other commercial establishments, their husbands are entitled to their shares, and become partners in their stead.[2] By the custom of London, a feme covert may be a partner; married women may contract partnership when they are deserted by their husbands, or when their husbands have been transported, or are exiles.[3] In France, a married woman may contract partnership even with her husband, and she may be held liable with her husband for partnership debts. Though, by marriage, all her property vests in her husband, and therefore she has no separate property to put in common for the purposes of partnership, still, as by such a contract she acquires a right of control over the business, that advantage is enough to enable her to stand in the new character towards her husband.[4]

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[1] Goode *v.* Harrison, 5 B. & Ald. 147. Holmes *v.* Blogg, 8 Taunt. 35.

[2] Cosio *v.* De Bernales, 1 C. & P. 266.

[3] Beard *v.* Webb, 2 B. & P. 93. Lean *v.* Schultz, 2 W. Bl. 1195.

[4] Dalloz Jurisprudence, 1851. Le Sieur Gavelle.

138. Idiots cannot be partners, and when a partner becomes subsequently a lunatic, the Court of Chancery grants a decree for the dissolution of partnership. If a case arose in which it was clearly established that the party is what is called an incurable lunatic, by which he is rendered incapable to contribute the necessary skill and industry, that would be a good ground to put an end to the partnership.[1] Clergymen cannot engage in partnership. No spiritual person can engage in any trade, or enter in ordinary partnership, though they may form part of associations consisting of more than six persons.[2]

139. Alien friends may lawfully contract a partnership, but alien enemies are prohibited from trading. In America, it has been held that the breaking out of a war between two countries has the retroactive effect of dissolving a partnership existing between persons domiciled in the two belligerent countries.[3] But although for a time all intercourse between the partners would be at an end, the ground for dissolution, being of a temporary character, ought not to justify a sudden severance of the relations of partnership. By the civil law, civil death has the same effect with regard to partnership as natural death.[4]

Section III.—KINDS OF PARTNERSHIP.

140. The most practical classification of partnerships is the common law division of two kinds,—private partnerships, which are composed of two or more persons; and public companies composed of a large number of persons, the stock being divided in a number of shares. The latter are sub-

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[1] Waters *v.* Taylor, 2 Ves. & Beam. 292, 302. Sayer *v.* Bennett, 1 Cox, 107. Jones *v.* Noy, 2 My. & K. 125.

[2] 37 Geo. III. c. 99, § 3. 1 & 2 Vict. c. 10. Van Espen, Jus Ecclesia, III. 548.

[3] Story on Partnership, 189. Griswold *v.* Waddington, 15 Johns, 438.

[4] 1 Domat. B. 1, de Tit. 8, § 5, arts. 11, 12, 15.

divided into companies by charter from the Crown, or incorporated by special Act of Parliament—companies constituted under the Joint Stock Companies Acts, or Mining Companies. Partnerships are also divided into universal and limited. Universal partnership, that is, where everything that is done, bought, or sold, is to be deemed on partnership account, is seldom entered into, as most men own some real or personal estate, which they manage exclusively for themselves.[1]

141. In the United States of America, there are ordinary and limited partnerships, and chartered corporations for banking, railways, &c. Limited partnerships are distinguished from ordinary, in the limitation of liabilities contracted by some of the partners. In France there are three kinds of partnerships, viz. partnerships in collective name, partnerships *en commandite*, and anonymous partnerships. Partnership in collective name is that contracted by two or more persons for carrying on some business under a social name or firm, containing the names of some or all of the partners. Partnership *en commandite*, or limited partnership, is that where the contract is between one or more persons responsible to the full extent of their property, and one or more persons who merely furnish a certain sum as temporary shareholders, called *commanditaires*, the business being carried on under the social name, including the names of the general partners *only*, the liability of the *commandite* partners being limited to the amount they have invested, or have engaged to invest, in the partnership.[2] Anonymous partnerships are those whose affairs are carried on, not by the name of the partners, but by that of the undertaking itself. In Holland and Belgium, the same kinds of partnership are recognised by law; so in Spain and Portugal, and in other countries in Europe.

142. Ostensible partners are those who are known to the world as partners, and who, in fact, are such. *Nominal partners* are those whose names are inserted in the firm as

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[1] United States Bank *v.* Binney, 5 Mason, 176.

[2] Code of Commerce, 20—26.

ostensible partners, although they have no real interest in the concern. In that case it matters not what agreement there may be between him and those who share the profits and loss; they are all equally responsible, and the contract of one is the contract of all.[1] A contract of partnership may therefore not exist, and yet by lending his name and credit to a concern as a partner, or suffering his name to continue in the firm after he has ceased to be an actual partner, an individual becomes liable for its engagements as a nominal partner. A case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners—that *A* is to contribute neither labour nor money, and, to go further, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the rest of the world a partner; not upon the ground of real transactions between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, where they lent it only to two of them, to whom without the others they would have given nothing.[2]

143. Voluntary partners are those who, though not actual partners, do any act of a nature to induce others to believe they are partners. If it can be proved that *A* held himself out to be a partner to a person, or under such circumstances of publicity as to make *B* believe that he was a partner, he would be liable to *B* in all transactions in which he engaged and gave credit to *A* upon the faith of his being such partner. *A* would be bound by an indirect representation to *B* arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and acted upon that statement. The holding oneself out to the world as a partner is a voluntary act of the party. Thus when a person allows his name to remain in a firm, either exposed to the

[1] Guidon *v.* Robson, 2 Camp. 304. Baker *v.* Charlton, Peake, 80. Hesketh *v.* Blanchard, 4 East, 144. *Ex parte* Hamper, 17 Vesey, 404. *Ex parte* Langdale, 18 Ves. 300.

[2] *Per* Lord Chief Justice Eyre, Waugh *v.* Carver, 2 H. Bl. 235.

public over a shop door, or to be used in printed invoices, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, are the very ground upon which he is stopped from disputing his liability as a partner.[1] When, however, a person, though appearing to the world as partner, does not participate in the profits, he may, by giving notice of the stipulation, exonerate himself of his liability towards such a person as received the notice. In a case against the acceptor of a bill of exchange, it appeared that the bill was drawn by the firm *Guidon and Hughes*. *Guidon* traded under such firm, but he had no partner who participated in the profits of his business: he had, however, a clerk of the name of *Hughes*, at a fixed salary, who was held out to the world as his partner, and was generally considered as such. On an action against the acceptor of the bill by *Guidon* in his own name only, it was objected that *Hughes* ought to have been joined in the suit. Park *arguendo* insisted, that the case stood exactly the same as if there had been no such person as *Hughes in rerum natura*. The names in a firm are quite immaterial. Firms sometimes continue unchanged for generations, and when the names of the real partners no longer correspond with any of those ostensibly used: persons who deal with the firm, therefore, contract with those really comprising the partnership. It is very common for men trading by themselves to add *and Co.* to their names, and if, instead, they add the name of another person who had no share in the business, the legal effect must be the same. Lord Ellenborough did not sanction such a practice. He said, "There being such a person as *Hughes*, I am clearly of opinion that he ought to have been joined as a partner. Persons in trade had better be very cautious how they add a fictitious name to their firm for the purpose of gaining credit."[2] It is to be regretted that such practice is resorted to extensively in the commercial towns of the United Kingdom, where a number of firms, though styled

[1] Guidon *v.* Robson, 2 Camp. 302. Gerish *v.* Lockhead, 20 L. T. 296.

[2] Guidon *v.* Robson, 2 Camp. 304.

with the words "and Co." are, in fact, carried on by single individuals; moreover, many firms continue under the names of those who have been long dead, or of those who have retired from the business.[1] In the United States of America, the abuse of the words "and Co." and the use of fictitious firms, have been suppressed by statute, by declaring that no person shall transact business in the name of a partner not interested in his firm, and that where the designation "and Company," or "and Co.," is used, it shall represent an actual partner or partners; and the violation of the provision is made a penal offence.[2]

144. Dormant partners are those whose names do not appear in the firm, but who share in the profits; and they are responsible for all the debts of the firm as the ostensible partners. Thus if *A* and *B* should agree to carry on their trade or business for their joint account, dividing profits and losses between them, *A* alone being known in the trade, and being solely responsible for the debts and contracts, and *B* merely a secret, dormant partner; *B* would nevertheless be deemed a partner as to third persons, and responsible to them for all the debts and contracts growing out of such a trade.[3] So in all cases of simple contracts, a dormant partner would be liable, when discovered, for the engagement of the partnership, although the party who sues him was, at the time he contracted, ignorant of his having any interest in the partnership.[4]

Section IV.—Formation of the Contract.

145. The contract of partnership need not be drawn out in writing; it may be established by verbal agreement, or inferred from the acts of the parties. But if it is for a period longer than one year, it must be in writing. It is of the last

[1] Young *v.* Axtell, cited 2 H. Bl. 242. Story on Partnership, §§ 64, 65.

[2] 3 Kent Comment. 7th ed. p. 30 n. Statute of New York, 1833.

[3] Robinson *v.* Wilkinson, 3 Price, 538. Newmarsh *v.* Clay, 14 East, 239.

[4] Gellar *v.* Hutchinson, 1 Rose, 297. Wintle *v.* Crowther, 1 C. & I. 316.

importance that all partnerships should subsist upon written articles, and that these written articles should provide for all the emergencies which may befal to the partnership during the course of its existence. The deed usually specifies the nature of the business, the date and commencement of partnership, the term and duration of it, the style of the firm, the place of business, the capital of the firm, the capital which each partner is to bring, the proportion of the profits and losses to be taken and borne by each partner, the reservation of the rights of any partner in any specific property, the allowance to partners to draw certain sums at stated intervals, the general duties of partners, the mode of keeping accounts, the parties authorized to sign drafts, acceptances, and other securities in the name of the firm, the power to dissolve on notice, mode of valuation, and general winding up of the accounts, the optional clauses to continue the affairs, and the arbitration clauses.

146. The duties and obligations of partners are regulated, as far as they are touched, by the express contract; if it does not reach all their duties and obligations, they are implied and enforced by law. All the parties to the contract ought to intervene in it, and when complete, the articles cannot be altered; nor can another person be introduced into the partnership without the consent of all the partners. A partner may give to a third person an interest in his share, but cannot make him a partner. It is the duty of every partner to carry out the provisions of the partnership deed, and the intentional non-performance of any of the duties therein prescribed may give ground for a dissolution. But although partners enter into written agreements, stating the terms upon which the joint concern is to be carried on, it is always to be understood that a partnership agreement is open to variation from day to day. Partners, if they please, may, in the course of their partnership, daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made with the unanimous concurrence of all the

partners. And such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting the business.[1] So if there be a long course of dealing, or long enough to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed the terms by their conduct; in which cases, such clauses on which the parties have not acted, are read in a court of equity as if they were expunged.[2] Bonds executed by partners relating to their rights as partners, bearing the same date as the partnership deed, are read in court as part of the partnership contract.[3] The courts of law and equity will cause all the provisions of the partnership deed to be scrupulously carried out, except that by which the partners agree to refer to arbitration any dispute which may occur amongst themselves during the course of the partnership. The court of equity will not be precluded by such an agreement from granting its ordinary remedy,[4] and no action at law is maintainable for a breach of such stipulations.[5]

147. This anomalous state of the law is tantamount to affording a premium to the non-observance of a voluntary contract. Partnership disputes are often most intricate, but depending on matters of fact easily investigated by arbitrators. The agreement to refer is a valuable consideration to the contract, especially owing to the difficulty experienced in bringing partnership disputes before the ordinary tribunals. Lord Eldon, in his judgment in Street *v.* Rugby, discussed the subject at large. He said, "The plea means this, that the parties will not harass themselves by going to courts of justice, but will state to each other what is in dispute, and refer to arbitration; and, entering into such a covenant, they must be taken to

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[1] England *v.* Curling, 8 Beav. 133. [Geddes *v.* Wallace, 2 Bligh. (O. S.) 270. Jackson *v.* Sedgwick, 1 Swan, 46.

[2] *Ex parte* Harris, 1 Rose, 437.

[3] Morrison *v.* Moat, 9 Hare, 260; 15 Jur. 787.

[4] Street *v.* Rugby, 6 Ves. 815. Tatersall *v.* Groote, 2 B. & P. 131.

[5] Kell *v.* Hollister, 1 Wills, 129.

mean that they will be content with a decision upon such discovery as arbitrators can compel. They chose, therefore, that forum, exclusive of the jurisdiction of the country, to all intents and purposes. I doubt whether it is a very wise exercise of the jurisdiction of this court, recollecting that it is to give a relief beyond the law, not to order the parties to go to law to take the effect of the stipulated remedy, but, under a positive covenant that they will not sue, to send them by way of experiment to that jurisdiction; and whether the court would not act more directly by saying, They are in a court where justice can certainly be done, and, as they have not stipulated to the contrary, their fate shall be decided here, instead of sending them to so improvident a tribunal. I recollect passages in which courts of justice, however full of eulogia upon these domestic forums, have recollected their own dignity sufficiently to say that they would not be auxiliary to these forums,—that the parties should not be permitted to take their relief from them coming here (Chancery courts) for discovery." He then suggested a prudential way of drawing these articles, by an agreement for liquidated damages; that is to say, to stipulate that a certain sum shall be the penalty for breach of any of the articles. But it would be impossible to fix the measure of compensation for the non-performance of any of the articles of partnership, as they differ so much in their respective importance, and, moreover, in the circumstances under which the breach might take place. Hence such an expedient is not resorted to, and the agreement invariably inserted in all partnership deeds becomes *nudum pactum*.[1] In France, all disputes between

[1] To remedy the defect of the law on this subject, a Bill was introduced by Lord Brougham in the House of Lords in 1854, by which every agreement to refer may be produced as a barrier to any action at law, or suit in equity, brought by any party to such an agreement. But if a reference has been attempted, and has entirely failed, without fault of the party suing, such failure is a sufficient ground to justify him to proceed with the suit. That agreements to refer shall not be revocable without the written consent of all parties, or by leave of court; and that it shall be lawful for the arbitrator to examine on oath, unless the submission expresses an intention that the examination shall not be on oath or affirmation. If, in any case of arbitration, reference be made to more than one arbitrator, and any party fail to make

partners, and for causes connected with the partnership, must go before arbitrators; an appeal being granted from their awards to the superior courts. In case of refusal by one or several of the partners to nominate arbitrators, they are nominated by the tribunals of commerce.

148. A partnership takes effect from the date of the contract. From the moment the agreement is actually formed, each partner becomes responsible for the performance of every duty and obligation consequent therefrom, and becomes individually and collectively bound for all the liabilities of the partnership; and, with regard to the actual commencement of partnership transactions, those are not excluded which are necessary by way of introduction or preparation for a partnership dealing.[1] There may be an agreement for a present as well as for a future partnership.[2] When the terms of a contract to carry on any business between a certain definite number of persons are unconditional or complete, then the partnership is actually formed; but if a person agree to become a partner at a future time, provided other persons agree to do the same, or provided any other previous conditions are performed, then no partnership is contracted. When, however, the agreement is complete and unconditional, a delay in executing the deed would not render it less valid from the day originally fixed, and the liability of the members of the firm will commence from the time originally agreed on.[3]

149. In all cases of disagreement, each partner has an

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such appointment, the remaining arbitrator is authorized to act alone, and make an award which shall be binding on all parties; and if, where the reference be to a single arbitrator, the parties do not, after differences have arisen, concur in the appointment of one arbitrator, the County Court Judge may appoint such single arbitrator. Any party who, having agreed to submit any matter of difference to arbitration, or to concur in the appointment of any arbitrator, refuses to make such appointment, or wilfully delays or prevents an award being made, shall be deemed guilty of contempt of court.

[1] Cruikshank *v.* M'Vicar, 8 Beav. 116.

[2] Dickinson *v.* Valpy, 10 B. & C. 140. Bourne *v.* Frith, 9 B. & C. 640. Meigh *v.* Clinton, 11 A. & E. 418.

[3] Battley *v.* Bailey, 1 M. & G. 155. Gabriell *v.* Evill, 9 M. & W. 297. William *v.* Jones, 5 B. & C. 108.

equal voice, and the majority rule the minority, unless specific regulation is made to the contrary.[1] Lord Eldon said, "In all partnership, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other. They are to act upon the joint opinion of all, and the direction and judgment of any one cannot be excluded. What weight is to be given to it is another question; the act of the majority will be deemed the act of all, provided all are consulted, and the majority act *bonâ fide*."[2] Moreover, once the objects of the partnership are specifically described in the partnership deed, neither of the partners can set up a totally distinct branch of business, except with the concurrence of all. If there be a departure from the line of business for which the partnership is formed, any of the partners may obtain from the Court of Chancery an injunction to arrest the prosecution of such business. It is not competent for any number of persons, in a partnership formed for specific purposes, to enter upon any different purposes, and to meet any opposition from the dissentient partners, by calling upon them to receive their subscribed capital and interest, and quit the concern.[3]

150. It is usual to provide for annual accounts to be made out, of balance of monies on hand, the valuations of stock-in-trade, credits of the partnership, and debts due by it; and also that such accounts should not afterwards be called in question, except for errors discovered in the life-time of all the partners. If, however, by reason of the fraud of any of the partners, just and true accounts have not been made out, there would be reason for the court causing account to be taken of the dealings and transactions of the partnership from the date of the articles.[4] The partnership articles, also, stipulate for the mode of winding up the concern, upon dissolution or expiration of the partnership. It is often agreed that a value should be set on the partnership stock, and that

[1] Const. *v.* Harris, Turn. & Russ, 496.
[2] Oldaker *v.* Lavender, 6 Simons, 239.
[3] Nasusch *v.* Irving, 2 Cooper, J. R. 358.
[4] Oldaker *v.* Lavender, 6 Simons, 239.

one or more of the partners shall be allowed to purchase the share of the others at that valuation. In the absence, however, of specific agreement, a court of equity will order the whole concern to be wound up by a sale, and the proceeds to be divided among the partners.[1] A sale of the partnership effects will also be ordered by the court, where the mode prescribed by the partnership articles is either impracticable or cannot be fairly obtained.[2]

151. Provision is also made in the articles for the expulsion of a partner for gross misconduct, or in certain specified cases. Such power can only be exercised *bonâ fide*, and for the benefit of the whole body, and not for the benefit of individual partners. Moreover, the construction of the deed, in reference to the mode in which a partner is to be expelled, and his interest acquired by the remaining partners, must be a construction of the strictest character, the power being extremely stringent. The time, also, when the notice may be given is of importance. It would be pretty certain not to be given at any time when the trade is depressed; it may be given at a period of the greatest prosperity; it may be given in the very last year of the partnership, when the whole assets are about to be realized. The expelling partners put themselves in the position of purchasers of the expelled partner's share; there must, therefore, be some mode of valuation of that share, consistent with the stipulations which the parties have come to. Where it appears that there was want of good faith on the part of the expelling partners, a court of equity will consider such expulsion void.[3]

Section V.—COMMON FIRM AND STATUS OF THE PARTNERSHIP.

152. A partnership is held as a moral person: it buys and sells, it deals and exchanges, and is accountable to the partners for their respective interest. The accounts are also kept in the

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1 Featherstonhaugh *v.* Fenwick, 17 Ves. 311.

2 Cook *v.* Collingridge, Jacob, 607.

3 Blissett *v.* Daniel, 1 Eq. Rep. 484, 8 Jur. 122.

name of the firm, and the property brought by each partner becomes the common property of the firm, and is placed under its control. Yet the separate existence of the partnership firm is not recognised by law; the property brought by the partners, though in common understanding it ceases to be the property of the respective partners, at law or equity it remains as such; and though the accounts are kept in the name of the firm, they are not so considered when they come to be examined in a Court of Chancery. One important consequence of the non-recognition of the partnership as a moral person is, that the partners individually are held to be the parties liable in the first instance for partnership debts, and it is in the power of the creditors to choose any party against whom to proceed; whereas, in accordance with the constitution of a partnership, the joint stock of the firm ought to be first liable for partnership debts, and each partner be held as a guarantee for the partnership, and not as the proper or principal debtor. In Scotland, a company forms a separate person, competent to maintain its relations with third persons by its separate name or firm, independently of its partners. In this respect the law of Scotland, which agrees with that of the Continent of Europe, is superior to that of England. In foreign countries, every partnership is held to be a separate person, but they are all subject to registration. By the French code, extracts of all deeds of partnership must be forwarded, within a fortnight of their date, to the office of the tribunals of commerce; the extracts to contain the names, surnames, and residences of all the partners, the style of the firm, the duration of the partnership, the amount of capital, and all other particulars. The system of registration has been introduced in England, in respect to joint-stock companies, to enable them to act in their corporate capacity. The right to sue in the name of their officers is also a sequel of the registration of partnerships; as in the case of a common partnership, however large the number of its partners, it must sue or be sued in the name of each separate partner.

Section VI.—PARTNERSHIP PROPERTY.

153. Partnership property consists of all property put into the partnership, and all property subsequently acquired by the firm by means of any transactions, and also of real estates purchased with partnership funds, in whosesoever name it stands, leases of premises, ships purchased or freighted. It may consist also of a patent or a copyright, or of the goodwill of a mercantile establishment, and also of the skill, and industry, and time, of each of the partners. Over such property all the partners have undivided interest, *per my* and *per tous*, and also a joint tenancy, which continues throughout all the changes that might be made in the course of trade. In consequence thereof, each partner has a specific lien on the partnership stock for everything he has advanced or brought in as his contribution; and also for the payment of the debts of the firm; and to charge the other, in the account, with what the other has not brought in, or has taken out more than he ought. But, although partnership property may be used and risked for common profits of the partners, it may still remain the private property of one of them. The profits accruing from it may be divided, and yet not the ownership of the property. It rests on the terms of the transaction, and on the intention of the parties, to discover whether there existed between the partners a joint interest in the stock.

154. We have already observed that a considerable difference exists between partnership and joint-tenancy, as to the mode in which property is held, and as to the rights therein acquired by the parties. In tenancy in common, as in a ship, each party has a separate, although an undivided, interest of his own share; but in a partnership, the partners are joint owners of the whole property. A ship-owner, for instance, can dispose only of his own share in the ship; but a partner has the control and disposal of the whole of the partnership funds. The same principles are applicable to real and personal

estate, the latter being considered in equity as personalties.[1] In the consideration of the rules relating to the disposal of the partnership property, in case of death of one of the partners, we shall examine the doctrines of survivorship, by which the property and the disposal of it are held, in equity, as vesting in the survivor; in so far only as relates to the management of it, the title to it vesting in the representatives of the deceased partner.[2] This departure from the established law regarding joint-tenancies, granted for the encouragement of trade, has not been followed by the courts of law. Sometimes the goodwill of the trade, that is, that advantage which arises from a long-established custom, often on account of the situation of a shop, and often on account of the sole ownership of a trade, is treated as part of the partnership property. But the goodwill of a trade is not, properly speaking, actual property which can be divided among the partners, unless by the sale of the whole establishment, with a view to a division of its proceeds.[3]

Section VII.—INTEREST OF THE PARTNERS IN THE PROPERTY AND THE PROFITS.

155. The interest of a partner in the partnership property is his share in the surplus, after the partnership accounts are settled, and all just claims satisfied. It is the same for real as for personal property. No partner has an exclusive right to any part of the joint stock, until a balance of accounts be struck between him and his copartners, and the amount of his interest accurately ascertained.

156. The interests of partners in the profits is a matter of agreement, and, when so defined, the evidence is conclusive; but in the absence of any contract between partners, or any

[1] 1 Story, Eq. Jurisp. 674. Morris *v.* Barrett, 1 Young & Jer. 184.

[2] Jackson *v.* Jackson, 7 Ves. 535. Buckley *v.* Barber, 15 Jur. 13 Exch. Anderson *v.* Tomkins, 1 Brock, 556. Blake *v.* Nutter, 1 Appleton, 16.

[3] Shackle *v.* Baker, 14 Ves. 468. Crawshay *v.* Collins, 16 Ves. 218. Cruttnell *v.* Lye, 1 Rose, 123. Featherstonhaugh *v.* Fenwick, 17 Ves. 298.

dealing from which a contract may be inferred, it will be assumed that the partners have carried on business on terms of equal partnership, which implies that each partner has a right to participate in equal proportion in profit and loss.[1] This will apply, also, where one partner contributes all the capital, and the other his labour only. The Spanish code prescribes that, when a deed of partnership does not determine the proportion of the profits in which each partner is interested, the profits are divided in proportion to the capital invested by each partner; but that the industrial partner shall participate in the profits, in the same proportion as the partner who contributed the least share in the capital, at the same time allowing the industrial partner not to participate in any loss.[2] The same provisions are found in the French code,[3] not, however, with respect to discharging the industrial partner from the responsibility of loss. The Portuguese code has the same regulation, but it confers no authority to such partner to contract in the name of the firm.[4] The Austrian code leaves it to the tribunal to fix the rate of profits which the industrial partner should participate in, in proportion to the importance of the business, the nature of the work, and the utility of his cooperation.[5] By the law of Scotland, where there is no express contract between partners, it is not a necessary presumption that the profits are to be divided in equal shares, but it depends on the evidence of all the circumstances, on goodwill, skill, capital, and labour, to ascertain what the proportion of interest in the profit and loss shall be. Although partners may have shared equally in profit and loss, the presumption of an equal partnership will be rebutted, if, from the entries in the books, it should appear that the shares in which the parties were entitled in the business materially

[1] Stewart *v.* Forbes, 1 H. & T. 461. Peacock *v.* Peacock, 2 Camp. 45. Walstab *v.* Spottiswoode, 15 M. & W. 502. Farrar *v.* Beswick, 1 M. & Rob. 527.

[2] Spanish Code, 318. See Levi's Commercial Law of the World, vol. i. p. 104.

[3] French Code, 1853. See ditto, p. 92.

[4] Portuguese Code, 559 and 560. See ditto, p. 92.

[5] Austrian Code, 1193. See ditto, p. 141.

differed in amount and value; the entries in the books of a partnership being as conclusive evidence as if the conditions were prescribed in a regular contract.[1]

Section VIII.—DUTIES OF PARTNERS.

157. Partners join their capital, labour, and industry, to the attainment of the common good; they choose each other on account of the peculiar advantages possessed by each; and form among themselves a tie which cannot be broken before the prescribed time, except under extraordinary emergencies. They bind themselves to act, the one for the other, as every one would do for himself; they owe reciprocity to one another, upright fidelity and integrity; and each engages to share with the other whatever they have belonging to the community, with all the profits and other revenues which they may reap from it, and not to keep anything to themselves but what they may lawfully do by their contract.

158. They are likewise to bestow their utmost care to the affairs and effects of the partnership, and to use the same application and vigilance in the business of the firm as they would use in their own. Partners are not responsible for any accidents, nor for slight faults, but are accountable for all deceits, and for gross negligence, unskilfulness, or wanton misconduct, in the course of the partnership.[2]

159. If one of the partners appropriate to himself or conceal anything belonging to the partnership, or if he put it to his own use contrary to the intention of the copartners, he commits a theft, and will be liable to make good all damages. And if, having in his hand some of the money belonging to the joint stock, he lay it out to his own particular affairs, he will be obliged to pay interest for it, as a reparation of damages to his copartners, and as punishment for his own infidelity. The whole of the partnership property must be

[1] Stewart *v.* Forbes, 1 H. & T. 461.

[2] Domat. Civil Law, L. 52, No. 1 & 3, D. pro-soc.

used for the exclusive benefit of the partnership. So if a partner stipulate clandestinely for some private advantage, or if he obtain some private allowances in purchases, or any secret per centage of commission, he would be compelled to share the same with his partners.[1] So if he were to purchase goods, and make the bargain by a barter with his own private goods, charging the partnership with the full cost value, this would be a constructive fraud upon the partnership.[2]

160. The partners cannot take out of the common stock the capital they have brought in, because the whole stock belongs to the partnership, and cannot be diverted or diminished without the consent of all the partners, while the partnership lasts. And it is no more lawful for a partner to diminish the common stock, than it is to break off from the partnership unfairly, and with a sinister view. Neither of the partners can engage in any other concern which may necessarily give them a direct interest adverse to the undertaking.[3] And as each partner stands trustee to the partnership concern, he should not, in pursuit of his private advantage, place himself in a situation which gives him a bias against the due discharge of that trust or confidence. In general, each partner must act with scrupulous good faith, afford a zealous cooperation in the objects of the partnership, be exact in keeping accounts, and have them ready at any time for inspection and explanation, and carry out the interest of the partnership with due care and skilfulness, each partner having equal rights and equal duties to perform in the management of the concern.

Section IX.—Extent of Liability of Partners.

161. Each partner in a commercial partnership is, at law, answerable for the amount of the whole of the debts of the

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[1] Featherstonhaugh *v.* Fenwick, 17 Ves. 298.

[2] Crawshay *v.* Collins, 15 Ves. 218. Burton *v.* Wookey, 6 Madd. 367.

[3] Glassington *v.* Thwaites, 1 Sim & Stw. 133.

concern.[1] No restriction of liability, except by charter or by statute, is permitted to any of the partners; all are liable, not only to the extent of their interest in the partnership fund, but also to the whole extent of their separate property, and, as Lord Eldon said, "to the last acre and the last shilling." No person can advance any capital to any undertaking, public or private, in the profits of which he is to participate, nor become partner or shareholder in any enterprise or profit, without becoming liable to the whole amount of his fortune. Partners may limit their individual responsibility towards each other, and will be bound among themselves by such stipulation, but it will not affect third persons. So they may agree among themselves that each shall subscribe and be responsible for a certain sum only; and when one has paid up the whole amount subscribed for by him, he is no longer responsible for any further amount to his copartners. But with respect to third parties, who have no notice of the terms of the partnership, all partners have an unlimited responsibility.[2] When, however, such restrictions can be clearly notified, as in a policy of insurance, where a clause is commonly inserted declaring the limitation of the responsibility of the partners to the amount of the shares, then such an express notice will be sufficient, there being both a notice and a direct concurrence in the limitation of liability on the part of all who take such policy, and third parties, possessing such policy, would have to look to the funds of the company alone for the recovery of any claim upon them.[3]

162. A company, styled the "General Maritime Insurance Company," was formed for the purpose of effecting insurances on vessels; and it was agreed that there should be a capital of 1,000,000*l.* in 100 shares; that the direction of affairs should be vested in directors, who had power to make calls, and that every policy should be signed by three directors, and that they should be indemnified for all liabilities out of the

[1] Carlen *v.* Drury, 1 V. & B. 157.

[2] Rex *v.* Dodd, 9 East, 527.

[3] Hallett *v.* Dowdale, 21 L. J. 98. Q. B. Vice *v.* Fleury, 1 Y. & Jer. 227.

fund of the company; that the directors should cause it to be stated in every policy, by which an assurance should be effected with the company, that the subscribed capital of 1,000,000*l.*, and the stock and property belonging to the company, should alone be liable to make good all claims and demands upon the company in respect of such policy; that the directors issuing the policy should not be responsible to any greater extent than the funds or property in their hands; and that no proprietor should in any event whatever be liable, beyond the amount of the unpaid part of his share, in the subscribed capital of 1,000,000*l.* A total loss on a policy of insurance of 11,000*l.* having become due, the insured sued some of the shareholders, who pleaded that the capital of the company was not sufficient to pay the claim. The questions at issue were, first, Whether the policy of insurance contained a joint promise whereby all the shareholders became insurers. Secondly, What was the amount of liability of each shareholder, and to whom were they liable for the amount of their shares; to the company, or to each individual claimant?

163. In a case of a similar character previously decided by Lord Denman, that eminent judge held that the clause restricting the liability of the company to the amount of the capital subscribed, could only mean that the assured should look to the funds of the company alone so far as any remedy at law extended, and that the individual subscribers should be liable only to contribute to the funds of the company to the amount of their respective shares, which liability must be enforced by the company against the subscribers, either at law or in equity as the case may be. But the enforcement of such liability might possibly be compelled by the assured by some proceeding against the company, therefore, by the contract itself (the policy), the assured was precluded from any legal proceedings against the individual subscribers. In the case of the Maritime Insurance Company, Baron Parke construed the term "company" to denote "the funds of the company," which alone were to pay; or that it meant, not the whole body

collectively, so as to make the whole body joint-contractors, but each individual of the company, so as to make each of them contract to bear the loss, in the same proportion as his share bore to the total capital in the nature of a separate under-writer. There may be difficulties in ascertaining how much each was to pay, in a case where the assured has already been obliged to contribute to other losses; but similar difficulties would exist if all jointly undertook to pay out of the capital stock. If the capital stock had already been reduced by the payment of prior claims, the residue only would be the capital liable to pay. But whatever difficulty might arise on this ground, the assured must suffer, for the individual proprietors were never meant to be responsible for any other than themselves.

164. With respect to the right of parties to limit their liability by special contract, the following pointed observations were made by Baron Platt:—"It was contended in the course of the argument that this was in fact an attempt, on the part of partners, to do that which the law would not permit. If partners jointly contract, without in any manner restricting or qualifying their responsibility, there is no doubt they are jointly, personally, and generally responsible. So an agreement among themselves, unknown to the party with whom they contract, will not alter that general liability; but if the party with whom they contract shall, by the terms of the bargain, agree that this responsibility shall vary from the ordinary responsibility, he will be bound by that agreement. What objections could be raised to a contract by which four parties agreed to buy of a merchant merchandise, upon the terms of one of them paying half the price, and the three others paying each a third of the remainder; and by which it was distinctly stipulated between the buyers and the seller, that the seller should not be entitled to demand payment, except in the several proportions, and severally from the different partners? Is that an illegal contract? Is the law to make a contract which the parties never contemplated? It is no answer to say that they contracted as partners, and that by

the general law partners are jointly liable; for in the case supposed, they would not have contracted on that footing. The terms of the contract would regulate the application of the law, provided it did not infringe it by illegality. By these terms the partners assumed, and the seller was content to accept, a qualified and definite responsibility—and what could the seller exact more?" [1]

165. Here, however, a *mutual agreement* is presumed to exist between the parties as to the limitation of liability. Where no such consent has been proved, no contract of the partners among themselves would discharge them of an unlimited liability towards third persons. The Lord Chancellor, in the recent case of the Sea and Fire Insurance Company,[2] laid down the following rules on the subject: "Every person engaged in a partnership is liable for every thing. If three persons agree to carry on a business together, notwithstanding they stipulate among themselves that no one should be liable beyond 1,000*l.*; if a debt were contracted in the conduct of the business to the extent of 10,000*l.* every one of them would be liable to the 10,000*l.*, and the stipulations so made would be inoperative. That doctrine does not depend upon the persons dealing with them having or not having notice of such stipulation, for the creditors would only know what engagements the partners had made among themselves, and their rights are rights extrinsic of any such contract, and therefore the notice would be wholly immaterial. If the decree of partnership were hung up in a shop, and it contained a provision, 'Notice is hereby given, that it is agreed that none shall be liable for more than 100*l.*,' that would make no difference." Such is the law in common partnerships. The liability of partners may also be limited by charter, or by act of Parliament; but hitherto the legislature has shown much disinclination in granting charters,

[1] Hallett *v.* Dowdale, 21 L. J., Q. B. 115. See Halket *v.* Merchant Traders' Ins. Comp. 13 Q. B. 960. Reid *v.* Allan, 4 Exch. 326. Hassell *v.* Merchant Traders' Ship, Loan, & Ins. Assoc. 4, Exch. 525.

[2] 2 Eq. Rep. 260.

because, in the first instance, limited liability is a deviation from the general law, which can only be justified by special circumstances; and, secondly, on account of the presumed unfair competition between such privileged companies and the general traders. The subject of partnership *en commandite*, or with limited liability, will be treated on separately.

Section X.—RIGHTS AND AUTHORITIES OF PARTNERS.

166. Each partner is the accredited agent of the rest, whether they be active, nominal, or dormant, and has communicated to him all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in the business in which they are engaged.[1] He is by law held to be *præpositus negotiis societatis*, or to possess a general mandate to act for all the others. He has authority, on behalf of the firm, to transfer, pledge, exchange, or dispose of the partnership property and effects, for any purposes within the scope of the partnership, and in the course of its business.[2]

167. A partner has authority to buy and to sell on behalf of the partnership. A sale to one partner is a sale to the partnership, with whatever view the goods may have been bought, and to whatever purposes they may be applied; and all the partners are liable to the seller for the price of the goods.[3] A partner has also power to pledge the goods belonging to the partnership in which he is interested as a partner.[4] He may effect contracts of insurance[5] or charter-parties, borrow or lend money, act for bankruptcy, and, in general, do any other acts which are incident or appropriate to the business of the firm.

168. The like powers may be exercised by each partner,

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[1] Hawken *v.* Bourne, 8 M. & W. 710. Vere *v.* Ashby, 10 B. & C. 288.

[2] Fox *v.* Hanbury, Cowp. 445. Barton *v.* Williams, 5 B. & Ald. 395. Bond *v.* Gibson, 1 Camp. 185. Rapp *v.* Latham, 2 B. & Ald. 395.

[3] Raba *v.* Ryland, 1 Gow. N. P. 132. Reid *v.* Hollinshead, 4 B. & C. 867.

[4] Thickness *v.* Bromilow, 2 Cr. & Jer. 431. Un. St. Bank *v.* Mason, 5 Mason, 176.

[5] Hooper *v.* Lusby, 4 Camp. 66.

by drawing, negotiating, or accepting, bills of exchange or promissory notes, or drawing checks; but this authority is confined to partnerships for purposes of trade, because it is usual and expedient so to do in mercantile transactions. There is no custom or usage that attorneys,[1] or members of farming or mining companies, should be parties to negotiable instruments, nor is it necessary for the purpose of their business.[2] When, however, from the very nature of the company, it becomes necessary, or from the practice in other similar companies, it is usual, then the authority would be implied to exist.[3] Moreover, this authority can only be exercised by accepting or endorsing, in the true style of the partnership.[4] A partner cannot bind the partnership by bills signed in his own private name, or in any other name than that held out to the world as the name of the firm, unless it appears on the face of the paper to be on partnership account, and to be intended to have a joint operation.[5] If a partner draw or indorse a bill in the name of the firm, it will *prima facie* bind the firm, although passed in discharge of his own debts.[6]

169. But if the nature of the transaction clearly shows it to be separate, and if the party, at whose request a bill is signed in the name of the firm, knew at the time that it was not on the partnership account, nor for their benefit, but that it was the act of the partner, then, unless previous authority or subsequent approbation be proved, the party could not sue upon it.[7] Yet if it be taken *bonâ fide*, without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving security

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1 Harman *v.* Johnson, 20 L. T. 314.

2 Hedley *v.* Bainbridge, 3 Q. B. 316. Dickinson *v.* Valpy, 10 B. & C. 128. Thickness *v.* Bromilow, 2 C. & J. 431.

3 Ibid. Mullett *v.* Huchison, 7 B. & C. 639.

4 Newton *v.* Boodle, 3 M. G. & Scott, 792. *Ex parte* Peele, 6 Ves. 202.

5 Smith *v.* Craven, 1 C. & J. 500. Faith *v.* Richmond, 11 A. & E. 339. Kirk *v.* Blurton, 9 M. & W. 284.

6 Swan *v.* Steele, 7 East, 210. Sandiland *v.* Marsh, 2 B. & Ald. 673. Maclae *v.* Sutherland, 3 E. & B. 1.

7 Arden *v.* Sharpe, 2 Esp. 524. Shireff *v.* Wilks, 1 East, 48.

can disaffirm the act. A partner may render the firm liable for a loan for his expenses, while engaged in the partnership business, or for a purchase of goods such as the firm trades in, but which he uses in his own benefit; but when a man takes a security from one partner in the name of the partnership, in a transaction not in the usual course of dealing, he takes such a security at his peril.

170. A partner has power to bind the firm by a guarantee in a matter relating to the partnership, but not in one in which the partnership had no concern:[1] yet, if the firm adopt such a guarantee, they will be bound, although the guarantee may have been given out of the regular line of their business. It is not incidental to the general powers of a partner to bind his copartners by a guarantee; and, therefore, in commercial partnerships, where it is not usual for merchants in the common course of business to give collateral engagements of this sort, it would be necessary to prove that such partner had authority from the others to sign the partnership firm to the guarantee in question.[2] A partner would not bind the partnership for an acceptance in the name of the firm, for the purpose of raising a capital for the foundation of the partnership.[3]

171. The extent to which partners may render each other liable, as agents, goes beyond that which is strictly their ordinary and usual course of business; it goes to that which is so nearly akin to their ordinary course of business, that persons dealing with a partner may fairly and reasonably conclude that it is in their usual course of business, provided, however, the business be conducted through the instrumentality of the firm.[4] The acts and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners. Hence the acknowledgment, promise, or undertaking of one partner, with reference to the business of

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[1] Sandilands *v.* Marsh, 2 B. & Ald. 679.

[2] Duncan *v.* Lowndes, 3 Camp. 478. Story on Partnership, § 127. Hope *v.* Cust, 1 East, 48.

[3] Saville *v.* Robertson, 4 T. R. 720. Wilson *v.* Whitehead, 10 M. & W. 503.

[4] Bishop *v.* the Countess of Jersey, 2 Drewry, 143.

the partnership, is the acknowledgment, promise, and undertaking of all.[1] A partner has no implied power to bind the others by a submission to arbitration, made without their knowledge, assent, or authority:[2] he cannot bind his copartners by deed or instrument under seal, either for a debt or any other obligation, even when contracted in the course of their commercial dealings, unless a special power under seal be given for the purpose.[3] In Scotland a partner may bind his copartners in any form in which he can bind himself. There is no implied authority between partners in England to bind each other by an equitable mortgage, unless it can be inferred from accessory circumstances.[4] A partner may render his copartners liable even for his fraud and misconduct, provided it have a sufficient relation to the business of the firm, and is committed in his capacity of partner. So if a partner fraudulently negotiate securities belonging to the partnership, it would bind the firm;[5] and if a partner make any fraudulent representation of certain facts which did not exist, the firm will be bound as if they were true, and existed.[6]

172. All representations, notices, declarations, admissions, and acknowledgments, made by or to a partner, will bind the firm.[7] A release of one partner, and a compromise of a partnership debt, would bind all, as it has been said; if a person owe money to five several partners, he is not bound to pay them altogether, but may pay the debt to any of them, whose receipt or discharge operates as a receipt or discharge of the whole firm.[8]

173. Partners may restrict, by agreement, the authority of

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[1] Sandilands *v.* Marsh, 2 B. & Ald. 679. Wood *v.* Braddick, 1 Taunt. 679. Cheap *v.* Cramond, 4 B. & Ald. 663.

[2] Stead *v.* Salt, 3 Bing, 101. Hambridge *v.* De la Crouee, 3 M. G. & Sc. 742. Cleworth *v.* Pickford, 7 M. & W. 314.

[3] Harrison *v.* Jackson, 7 T. R. 207. Horsley *v.* Rush, 7 T. R. 148. Appleton *v.* Binks, 5 East, 148.

[4] *Ex parte* Lloyd, 1 Mont. & Ayrt. 494.

[5] Sanderson *v.* Brooksbank, 4 Car. & P. 286. Stone *v.* Marsh, Ry. & Moo. 364. [6] Rapp *v.* Latham, 2 B. & Ald. 795.

[7] Bignold *v.* Waterhouse, 1 M. & S. 249. [8] Stead *v.* Salt, 13 Moore, 395.

any partner; but, in order to render such restriction valid towards third persons, direct notice must be given, and then it will be operative only towards those who were made acquainted with it. The general authority of partners to bind each other, by their acts or negotiable instruments, is only implied; it may be rebutted by express notice to the contrary. Lord Ellenborough said, "It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm, to charge the others: they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him, by one of them, that he will not be liable for any bill or note signed by the others." [1] So, where a person, having sold his share in a mining company, gives notice of it to the persons who usually contracted with the company, the notice would be conclusive, and he would be no longer responsible. The firm would not be bound when money was lent, or goods sold, or any other contract made, upon the separate security of one partner only, although the money or property was put to the use and benefit of the partnership.[2] Where the transaction is wholly unconnected with, and beyond the scope of, the partnership business, the firm would not be bound by any contract entered into by a single partner, although the party implicitly trusted on the credit of the firm.[3]

174. The authority of partners to bind each other by contract commences with the commencement of the partnership. Where goods are sold to parties who are not partners, the seller will have his rights against the parties individually, although they afterwards were to become partners, because no act which passed subsequently to the delivery of the goods

[1] Galway *v.* Mathew, 10 East, 264.

[2] Bonfield *v.* Smith, 12 M. & W. 405. Lloyd *v.* Freshfield, 2 C. & P. 325. Faith *v.* Richmond, 11 A. & E. 339. Emily *v.* Lye, 15 East, 7.

[3] Bolton *v.* Pullen, 1 B. & P. 539.

can have any retrospect, so as to change the nature of the contract. But if the goods are bought by previous agreement on joint account, and the interest of the partners attached in them at the same instant, mutual liability would immediately commence. In order to bind the firm, the intended partner must either have purchased the goods by joint authority, or the transaction must have been subsequently ratified by the firm, and for which they afterwards agree to be jointly liable.[1]

175. An incoming partner would not be bound for the debts contracted by the firm previous to his joining it.[2] And even where the account was transferred from the old to the new firm, and interest was paid upon the loan, it cannot bind the new partner without his assent. Slight evidences, however, may be sufficient to show that the partner assumed all the outstanding debts of the firm. So, where, in the original transaction, the party to be bound was not a partner, but at a subsequent time he acquired all the benefit as if he had been a partner in the original transaction, slight circumstances might be sufficient to render him bound as a partner. In fact, if one man, having debts, take another into partnership with him, a very little matter respecting these debts will make them both liable. Where a new firm accepts a bill in respect to a contract made by the old firm, that would imply a ratification of the old firm, and every member would become liable.[3]

Section XI.—REMEDIES BETWEEN PARTNERS.

176. The ancient distinction of the equity from the common law courts, and the peculiar jurisdiction which the Court of Chancery possesses in questions of partnership, renders it essential to offer a brief outline of the nature and origin of equity jurisprudence, so as to draw a line of demarcation between the

[1] Saville *v.* Robertson, 4 T. R. 720. Gouthwaite *v.* Dickworth, 12 East, 421.

[2] Shirreff *v.* Wilks, 1 East, 48. Kirwan *v.* Kirwan, 2 C. & M. 617. Lloyd *v.* Ashby, 2 C. & P. 138. Williams *v.* Jones, 5 B. & C. 108.

[3] Lloyd *v.* Ashby, 2 C. & P. 138.

questions which are in the province of the respective courts of equity and common law. As early as the Anglo-Saxon times, the King exercised a kind of equitable jurisdiction, in order to mitigate the rigour of the positive laws, to modify their hardness, and to supplement their deficiencies. This prerogative of grace, this exercise of privilege, the germ of the jurisdiction of the Courts of Chancery, was delegated to the Lord Chancellor in the time of Edward the Elder, owing to the pressure of business which thereby fell on the King. The Chancellor was then the chief of the King's chapel, and, even down to William II., he signed amongst the chaplains only; but for a considerable time afterwards he exercised important functions, as a high dignitary in the Church possessing independent legal jurisdiction. It was during the reign of Edward III. that the Court of Chancery was formed into a distinct court, for giving relief in cases which required extraordinary remedy; but in effect the court consisted of one man, who, in most cases, was an ecclesiastic. This court at first possessed an ordinary jurisdiction, and was governed by the rules of common law; it commenced to acquire the character of a Court of Equity during the reign of Richard II.; and afterwards, in the time of Henry VIII., under the fostering care of Cardinal Wolsey, its jurisdiction was considerably expanded. Such is the origin of this important branch of English jurisprudence. The principles on which the Court was founded were, the exercise of the prerogative of grace, according to conscience, good faith, honesty, and equity, not to supersede the law, but to follow it. St. Germain said, "Conscience never resisteth the law, nor addeth to it, but only when the law is directly in itself against the law of God or law of reason." Notwithstanding this, however, the Court of Chancery, in some cases, administered its own remedy, even where that provided by the law was sufficient, and its interference was resented in vain by the Common Law Courts. The court of equity is not always strictly governed by precedents, though their influence is fully recognized. "There are," said Lord Redesdale, "cer

tain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law." [1]

177. When we speak of equity as contrasted with law, it would appear as if law were devoid of equity, whereas equity is the soul and the spirit of all law. For example, in the interpretation of contracts, it is not the strictness of the letter, but the spirit of the agreement and the intention of the parties, which are looked to both by the courts of law and equity. Like a court of law, the courts of equity are founded on the principles of justice and positive law. In questions of International jurisprudence, they follow the Law of Nations; and in mercantile disputes, they follow the Maritime Law, and argue from the usages of authorities received in all maritime countries. The essential difference between Courts of law and equity consists in the different modes of administering justice in each—viz. the mode of proof, the mode of trial, and the mode of relief. Thus, where the existence of a contract of partnership is controverted, and the written articles are either suppressed or concealed, until the late improvements in the law of Evidence, there was no evidence to go before a court of law; but a court of equity alone had an immediate remedy by a bill of discovery, appealing to the consciences of the individuals to produce what passed between the parties. Now, however, it is competent for the parties themselves to give evidence; and moreover, the common law courts are authorized, on application made for such purpose by either of the litigants, to compel the opposite party to allow inspection of all documents in the custody of such opposite party relating to such action, in all cases in which, previous to the passing of this act, the court of equity would have granted a bill of discovery.[2] The same mode by a bill of discovery, or, where practicable, by action at common law, would be applied to discover the number

[1] See Spence's Equitable Jurisdiction, and Story's Equity Jurisprudence.
[2] 14 & 15 Vict. c. 99, §§ 2 & 6.

of dormant partners in a firm; which, owing to the want of any system of registration in common partnerships, there is no legal means of ascertaining.

178. In order to exhibit perspicuously the concurrent jurisdictions of the Courts of law and equity in partnership disputes, we shall first see under what circumstances a partner may sue his copartners by an action at common law. The first general principle is, that no action at law can be maintained between partners on transactions founded on the partnership accounts. Yet a partner may maintain an action at law against his copartner for money lent to him for his separate use, upon a bill of exchange, because by such an acceptance a distinct and separate right is acknowledged to exist.[1] For the same reason, when a note is granted or a promise given, after a balance of account has been struck between the partners, an action could be maintained upon it; provided, however, such accounts were agreed to by all the partners.[2] In all cases where a particular transaction is separate by special bargain, constituting a separate and independent debt between the partners, a partner might sue upon that transaction.[3] An action may also be maintained for the breach of an agreement to pay a certain capital into the partnership funds;[4] or for the nonpayment of instalments when due, or upon agreed damages for the breach of articles, or even for breach of agreement to become a partner. In all such cases an action at law will stand, because the ground of action is clear; but an action could not be brought by one partner against his copartner for work and labour performed, or money expended on account of the partnership,[5] or on any ground of general disputes arising between partners: for, until

[1] Coffey *v.* Ryan, 10 Moore, 341. Wilson *v.* Cutting, 10 Bing. 436. Nockels *v.* Crosby, 3 B. & C, 814. Smith *v.* Barrow, 2 T. R. 476.

[2] Moravia *v.* Levi, 8 T. R. 483. Wray *v.* Milestone, 5 M. & W. 21.

[3] Jackson *v.* Stopherd, 2 C. & M. 361.

[4] Venning *v.* Leckie, 13 East, 7. Gale *v.* Leckie, 2 Stark, 107. Fromont *v.* Coupland, 2 Bing, 170. Carr *v.* Smith, 5 Q. B. 138.

[5] Holmes *v.* Higgins, 1 B. & C. 74. Brown *v.* Tapscott, 6 M. & W. 119. Teague *v.* Hubbard, 8 B. & C. 348.

all partnership accounts are settled, it is impossible to ascertain what are the respective claims of the partners—whether a particular partner is, in fact, a debtor or a creditor of the firm, even in the simplest case with reference to partnership affairs.[1]

179. The court of equity possesses a much more complete jurisdiction than the courts of common law, in matters of partnership, concerning any dispute arising out of the formation of the original deed, of the management of the partnership effects, of the bankruptcy or dissolution of the partnership, and on account of the death of the partners. A wilful and continued breach of partnership articles would afford a reasonable ground for the interference of the court, although such a breach must be so important in its consequences as to authorize the party complaining to call for a dissolution of partnership. Again, a court of equity would interfere where a partner raises money for his private use, on the credit of the partnership firm; but here, also, the danger must be such, there must be that abuse of good faith between the members of the partnership, that the court will try the question whether the partnership should not be dissolved in consequence.[2] Where a partner asks the interference of the court of equity in settling the accounts, whilst the partnership is still subsisting, he must have in view the dissolution of the partnership, because the court would not grant such an account simply for the purpose of his obtaining the share of the profits due to him. Yet it would not withhold its assistance, in directing accounts to be taken of the dealings of a partnership, with a view of having the common assets realized, and applied to the legitimate purposes.[3] We have seen that it is the duty of partners not to put themselves in situations likely to give them a bias against the interest of the partnership; so where there is an agreement between the partners that neither of them shall engage in any other business on his separate

[1] Bovill *v.* Hammond, 6 B. & C. 149; Cruikshank *v.* M'Vicar, 8 Beav. 112.

[2] Marshall *v.* Coleman, 2 Jacob & Walk. 269.

[3] Wallworth *v.* Holt, 4 M. & Craig, 619. Loscombe *v.* Russel, 4 Sim, 8.

account, an injunction might be obtained to restrain such partner from that trading.[1] If any partner is obstructed or interfered with in the enjoyment of his rights under the partnership articles, as, for example, if he was prevented from having full access to the partnership books, a remedy would be administered by injunction;[2] so if, notwithstanding an agreement to the effect of inserting the name of a partner in the name of the firm, his name were intentionally and continually omitted.[3] Numerous other instances of the same character might be given, where courts of equity will interfere by way of injunction; as, for example, they would restrain a partner from wasting the partnership property, from misusing the partnership name, or from committing such like grievous and fraudulent practices, which it is expedient at any cost to arrest. Let it, however, be understood, that, in cases of frivolous vexations, or mere differences of temper, or minor differences, the court would not interfere, as it is a matter of course that, when two parties enter into partnership, they entered into it with the fair understanding that such infirmities are to be borne with, and that they virtually, as in another relation of life, unite for the better or for the worse.

180. Another remedy, granted in some instances by the court of equity, is, the appointment of a receiver. This is even done during the continuance of a partnership; but it must be shown to be a case of the grossest abuse, and of the strongest misconduct on the part of the managing partners, and, except under such circumstances, the court would not interfere.[4] Exclusion from the management of a partnership would be a sufficient ground for appointing a receiver, unless the articles provided for such an emergency on the happening of certain events.[5] It must never be forgotten that, where the Court of Chancery interferes between partners by appointing a receiver, it is merely with a view to grant relief by winding up

[1] Somerville *v.* Mackay, 16 Ves. 382.

[2] Charlton *v.* Poulter, 19 Ves. 148. Goodman *v.* Whitcomb, 1 Jac. & Walk. 589.

[3] Marshall *v.* Coleman, 2 Jac. & Walk. 266.

[4] Oliver *v.* Hamilton, 2 Anstr. 453. Millbank *v.* Revett, 2 Mer. 405.

[5] Blackney *v.* Dufaur, 15 Beav. 40. Wilsons *v.* Greenwood, 1 Swanst. 1481.

and disposing of the concern, and dividing the product, but not for the purpose of carrying on the partnership; a receiver being only granted where it is auxiliary to the object of dissolution.[1] As to the time allowed for the enforcement of legal or equitable remedies between partners, the statute of limitation bars only the legal remedies; yet even the court of equity has adopted analogous rules, making six years the limit or convenient measure for an equitable bar.[2]

Section XII.—Remedies against third persons.

181. Partners in their collective capacity have, as a general rule, the same right to bring any suit at law or equity which it would be competent for any individual to bring. There are, however, some important exceptions. Owing to the want of distinction between the capacity of the firm and of its individual partners, it follows that where two private partnerships have one or more members in common, they cannot sue each other, because, as all partners must at law be included in every suit, the partner who is member of both partnerships would stand at the same time in the character of plaintiff and defendant in the suit. This is not the case in Scotland, where debts between companies, in which the same indivi-

[1] Story on Partnership, No. 231. Waters *v.* Taylor, 15 Ves. 10.

[2] Beckford *v.* Wade, 17 Ves. 96.

When we consider the tardy and expensive procedure of the Court of Chancery, and the anomaly of preserving the distinct jurisdictions of law and equity in the settlement of mercantile disputes, it would seem most important to the interests of commerce that one tribunal should be formed, having complete jurisdiction in all questions connected with trade, shipping, and bankruptcy. The constitution of new courts is necessarily attended with much difficulty and expense; but the principal elements of a Commercial Tribunal might be engrafted upon one of the existing courts. It has been suggested that the Courts of Bankruptcy might easily embrace the whole commercial jurisdiction. They are already to a certain extent courts of law and equity, and of all others seem most competent, by their acquired experience, and by their constitution, to sift commercial questions and accounts. The establishment of improved tribunals, to decide claims by and against partners in all partnership disputes, was recommended by the Committee of the House of Commons of 1851 on the law of partnership.

dual is a partner, are every day sustained as quite unexceptionable.[1] Another exception is, where one of the partners has given a discharge for a partnership debt, the partnership cannot sue upon it, not even where the partner has acted fraudulently; and a defence valid as against one of the copartners, is available as against all of them, in an action by the copartners. No person is allowed to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person.[2] In Scotland, a partner has no right to release a debtor pending a suit by the company; and a defence, although it would be valid against one of the partners, would not be available against the company.

182. In all suits against third persons, all the partners must join,[3] except the dormant or nominal partner. With respect to a dormant partner, it is quite optional to join him or not in the suit;[4] and, as regards a nominal partner, as he has no interest, there is no necessity for his joining.[5] In cases of written instruments made payable to certain persons by name, it may be questioned whether all must join in the action, notwithstanding all have not an interest in the contract, and there seems to be an apparent conflict in the authorities. The most cautious mode is to join them all.[6] In Scotland, a private partnership may sue and be sued by any of its members. It is not necessary to make an infant partner a party to the suit, except where he confirmed or ratified the contract after he attained his majority. If one of two partners be an infant, the holder of a bill accepted by both partners may sue the adult

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[1] 2 Bell's Comm. 620, 5th edit.

[2] Jones *v.* Yates, 9 B & C. 532. Jacaud *v.* French, 12 East, 317.

[3] Story on Partnership, § 241.

[4] Skinner *v.* Stocks, 4 B & Ald. 437. Cothay *v.* Fennell, 10 B. & C. 671 Lloyd *v.* Archbowle, 2 Taunt. 324.

[5] Guidon *v.* Robson, 2 Camp. 302. Parsons *v.* Crosby, 5 Esp. 109. Davenport *v.* Rackstraw, 1 Carr. & P. 89.

[6] Grove *v.* Dubois, 1 T. R. 112. Alexander *v.* Barker, 2 C. & J. 133. Cumming *v.* Forrester, 1 M. & S. 497.

only, in the name of both;[1] and where one of the partners becomes bankrupt, and has obtained his certificate, it would not be necessary to make him a party to the suit.[2] If one of several partners die, the action must be brought against the survivors. The partnership is generally bound for all contracts made in the name of the firm, and also for those which, although made in the name of one of the partners, are proved to be on behalf of the partnership, or for the benefit thereof. So in the converse case, where loans or other contracts are made by one partner, an action might be maintained by all the partners on account of the partnership firm.[3] Where, on a change in the firm, the existing contracts and effects become a part of the funds of the new firm, any action on such effects must be maintained in the name of the old firm, except in case of negotiable instruments regularly transferred to the new firm.[4]

183. A question of considerable importance arises where an execution is levied upon the partnership property by a creditor of a partner on his separate account. In such cases, the great principle to be observed is, that each individual partner has an interest in a residue only, after adjusting equities,[5] and that all the partners have a lien upon the whole of the partnership property for the payment of partnership debts, and for their separate rights to the property. Therefore, a separate creditor can only take and sell the interest of the partner in the partnership property: that is, his share upon a division of the surplus after discharging all demands upon the copartnership;[6] and in case of seizure of the property by the sheriff, for the purpose of sale, the Court of Chancery would interfere by restraining the sale.[7]

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[1] Thornton *v.* Illingworth, 2 B. & C. 824.

[2] 3 & 4 Wm. IV. c. 42, § 29.

[3] Robson *v.* Drummond, 2 B. & Ad. 303. Garrett *v.* Handley, 4 B. & C. 664. Walton *v.* Dodson, 3 C. & P. 162.

[4] Pease *v.* Hirst, 10 B. & C. 122. Osborne *v.* Harper, 5 East, 225. Wilsford *v.* Wood, 1 Esp. 182.

[5] Bennett *v.* Goude, 21 L. T. 231.

[6] Fox *v.* Hanbury, Cowp. 445.

[7] Taylor *v.* Field, 4 Ves. 396. Franklin *v.* Thomas, 3 Meriv. 234.

Section XIII.—LIABILITY OF RETIRING PARTNERS.

184. A partnership may be partially dissolved at any time, by the retirement of any partner; but, in order to cause a cessation of liability to the future engagements of the firm, the retiring partner must give express notice to all who had dealings with the partnership, and also insert the notice in the "Gazette."[1] The rule of law is, that where there is a partnership of any number of persons, if any change be made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who at first composed the firm.[2] The general usage of inserting the notice in the "Gazette," and sending it round to the correspondents of the house, has always been considered ample notice.[3] This notice, however, does not affect past transactions, with respect to which the retiring partner still remains liable for all the debts and contracts of the firm, but produces a discharge of liability to future debts.[4] If credit be given subsequently to the notice, or new securities be taken, or a fresh account be opened with the remaining partners, it is understood that a new and separate contract has been entered into. Care, also, must be taken by the retiring partner that his name be removed from the firm, or from the shop door; because, no matter what notice is given, so long as his name is permitted to remain he would continue liable.[5] A dormant or secret partner, or a person whose name does not appear in the firm, may retire without giving notice to the world, but still he would remain liable for contracts made or goods furnished during the time he participated in the profits of the concern.[6]

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[1] Parker *v.* Carruthers, 3 Esp. 248. Godfrey *v.* Turnbull, 1 Esp. 371. *Ex parte* Burlton, 1 G. & J. 207. *Ex parte* Leaf, 1 Deac. 176.

[2] Parker *v.* Carruthers, 3 Esp. 248.

[3] Newsome *v.* Coles, 2 Camp. 290.

[4] Wood *v.* Braddick, 1 Taunt. 104. Ault *v.* Goodrich, 4 Russ. 430.

[5] Williams *v.* Keats, 2 Stark, 290. Newsome *v.* Coles, 2 Camp. 617. Dolman *v.* Orchard, 2 C. & P. 106.

[6] Brooke *v.* Enderby, 2 B. & B. 71. Heath *v.* Sansom, 4 B. & Ad. 171.

If he has been known by any person to be a partner, he must give notice to such of his retiring from the business, otherwise he would remain liable even after he actually ceased to be a partner.[1] In Scotland, a dormant partner, on retiring from the partnership, must give notice of his retirement to all persons then having relations with the partnership, whether they were or were not aware of his connexion with it, and also public notice by advertisement.[2] Generally, the responsibility of retiring partners ceases immediately that a *bonâ fide* dissolution takes place and notice is given; and an acceptance given by the continuing partner, in the name of the firm, after dissolution, would not bind the retiring partner, even if the bill were dated before dissolution.[3] But if the retiring partner had himself accepted the bill before dissolution, he could not then question his liability.[4]

185. The liability of the retiring partners with respect to past transactions is not diminished by his retirement, yet the creditor may, by new arrangements with the continuing partners, waive his right against the retiring partner; and this may be proved, either by an express agreement, or by facts and conduct from which the discharge of the retiring partner may be fairly inferred.[5] If the creditor consent to take a separate note of the continuing partner, strictly reserving his rights against all the members of the former partnership, he would still have his remedy against all. Taking a new security is not of itself sufficient to discharge the retiring partner, even if such security were renewed several times. If, however, at the maturity of a joint bill of exchange given for a partnership demand, the holder take the separate bill of the continuing partner, the other would be discharged.[6]

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[1] Evans *v* Drummond, 4 Esp. 89.

[2] Hay *v.* Mair, 27 Jan. 1809, Fac. Coll.

[3] *Ex parte* Liddiard, 2 M. & A. 87. Paterson *v.* Zechariah, 1 Stark, 71.

[4] Abel *v.* Sutton, 3 Esp. 110; Adams *v.* Bingley, 1 M. & W. 192.

[5] Hart *v.* Alexander, 2 M. & W. 484.

[6] Bedford *v.* Deakin, 2 B. & Ald. 210. Featherston *v.* Hunt, 1 B. & C. 113. Harris *v.* Farwell, 15 Beav. 31. Kirwan *v.* Kirwan, 2 C. & M. 617. Winter *v.* Innes, 4 My. & C. 108.

186. The retiring partner will, also, remain responsible for the balance of accounts due by the firm at the time of his retirement. Where the account is continued by the new firm, the balance for which the retiring partner is liable will be diminished by every payment which is made by the new firm, supposing such payment not to be appropriated to the discharge of any specific item. The first item on the debit side of the account will be discharged or reduced by the first item on the credit side: this is the method adopted with respect to cash or banking accounts. Where, however, goods are purchased upon bills or general accounts, bills drawn or payments made after his retirement, without any express appropriation at the time, do not go to the discharge of old liabilities.[1] We have already observed that if a retiring partner leaves a sum in the partnership at interest, or for an annuity fixed or certain, his liability to partnership debts will cease at his retirement; but if the annuity were uncertain, and fluctuating according to the profits of the partnership, his liability will still continue.[2]

Section XIV.—DISSOLUTION OF PARTNERSHIP.

187. A general dissolution of partnership is materially governed by the partnership articles; and it is all-important that commercial men, when entering into partnership, should advert to the necessity of providing, by express covenant, in what manner the affairs of the partnership are to be wound up, with reference to their respective interest, whenever there shall be what may be called, but what is not in effect, an end of the partnership. A partnership may expire by death, by effluxion of time, by notice, or by bankruptcy of a partner; but in all these cases—though, in a certain sense of the word expiration, a partnership does so expire in each and all of them—yet, in most instances, a partnership does not and cannot then expire to all purposes. In some it may not

[1] Clayton's Case, 1 Meriv. 572. Brook *v.* Enderby, 4 Moore, 501.

[2] Grace *v.* Smith, 2 W. Bl. 99. Young *v.* Anstell, 2 H. Bl. 242. Bloxam *v.* Bell, 2 W. Bl.

expire for years after the period in which, in one sense of the word, we say it does expire; and it must depend upon the nature of the partnership in what way it is to be carried on during the period in which it is to be wound up. If it expires by bankruptcy, there are introduced into it, as persons interested in the manner of winding up, the assignees of the bankrupt. If it expires by death, there are introduced, in like manner, the executors of the deceased partner; who may be stated, though certainly not in a very correct use of the term, to be a kind of assignees of the deceased partners. When it expires by notice, it may happen that, in many cases, the party who gave the notice may die long before the time arrives when it may be said to be quite dissolved, and his executors may become partners in the concern. In short, in every species of dissolution which may take place in different events, persons, in the course of time, may be introduced into the partnership, with reference to whom accounts must be settled, much in the same manner as it would have been necessary to have settled them with the original partners.[1]

188. A partnership may be dissolved—1st. By the act or will of the partners. 2d. By efflux of time. 3d. By the extinction of the concern itself, or on account of the impracticability of the object, or on account of the incapacity or insanity of a partner. 4th. By decree of a court of equity. 5th. By operation of law. 6th. By insolvency or bankruptcy of any of the partners. 7th. By outlawry, exile, transportation, or civil death of any of the partners. 8th. By death of one or more partners.

189. The first mode of dissolution is by the spontaneous will of the parties themselves. Whether the partnership be for a limited or unlimited period, it may be at any time dissolved by the mutual agreement of the parties.[2] Wherever there is no good agreement between the parties, or where any of the partners, owing to necessary absence or other reasonable ground, deem it expedient to withdraw from the partnership,

[1] Crawshay *v.* Collins, 15 Ves. 218; Crawshay *v.* Maule, 1 Swanst. 493.

[2] Nerot *v.* Burnand, 4 Russ. 260. Peacock *v.* Peacock, 16 Ves. 50.

it is quite competent to them to dissolve it; provided there be no sinister motives, or the dissolution does not take place at an unreasonable time, so as to cause loss and inconvenience to the partnership. Thus, if a partner were to quit whilst on a journey, or engaged in any other business of the partnership, he would be bound to make good the losses which he occasioned.[1] Where a time has been agreed on for the duration of the partnership, it is reasonable that due notice be given with a view to obtain a premature dissolution; but there is no rule as to the time to be allowed by such notice, provided it be given *bonâ fide*. A partnership at will is presumed to endure so long as the parties are in life, and have a capacity to carry on the business.[2]

190. Whenever the period for which the partnership was created has elapsed, it may be deemed as dissolved by the terms of the original contract; the articles are in force no longer, unless the parties like to continue the partnership on the same terms, or from the act of the parties a continuation or renewal of the contract may be inferred: but in such a case, the continuation of the partnership would be founded on a presumed new agreement, and not under the old one. When the partnership continues without fixing any term, the natural presumption is that it was continued upon the same terms as before, unless that presumption is rebutted by the other circumstances of the case.[3] Yet, without an express agreement, it will not be inferred that the partnership has been renewed for a like period, but only during the joint will and pleasure of all the parties. The circumstances which may concur, and such as may be urged in opposition to the sudden dissolution of partnership, were fully commented on by Sir William Grant Master of the Rolls, in a case of partnership which had existed upon articles by which twelve months' notice was necessary to enable a partner to withdraw, but which continued after a lapse of that period without articles. The

[1] Domat. Civil Law, B. 1, Tit. 8, No. 5, Art. 128.

[2] Story on Partnership, No. 271.

[3] United States Bank *v.* Binney, 5 Mason, 176.

first question was, whether the partnership, having originally been formed on articles by which a notice was to be given prior to dissolution, and having been renewed without articles, any partner had a right to put an end to the partnership without giving the same notice. On this point Sir William Grant held that the latter partnership was for an indefinite period, and therefore might be dissolved at the will of the parties. It was, moreover, objected that the lease of the premises used in carrying on the concern was then unexpired. But that did not oppose any obstacle to the dissolution, as it is not a necessary consequence that partners taking premises for the use of their trade for a definite period, contracted a partnership for the same period. Again, it was contended that there were several contracts subsisting which had a considerable period of time to run. But, according to this argument, a partnership could not be dissolved until all their contracts were completely ended and wound up. It would on that ground be hardly possible to dissolve any partnership, as there must always be contracts depending. The existence of engagements with third persons cannot form an objection to a dissolution. Notwithstanding any similar objections, the rule in the case of a partnership subsisting without articles, and for an indefinite period, is that any partner may say, "It is my pleasure on this day to dissolve partnership." A guarantee that such sudden dissolution may not take place by the caprice of any of the partners, is obtained by the fact that injury must necessarily arise from such a step to all the partners; because the immediate consequences of dissolution are, that the whole of the joint property must be sold off, and the entire concern wound up. No partner, therefore, can derive a particular advantage by choosing an unreasonable moment for dissolution, as every one must suffer in proportion to the extent of his interest in the trade.[1]

191. A partnership may be dissolved by tacit renunciation, and dissolution may be presumed by natural inference from

[1] Featherstonhaugh *v.* Fenwick, 17 Ves. 299. Heath *v.* Sansom, 4 B. & Ad. 172. Crawshay *v.* Maule, 1 Swanston, 495.

circumstances. If a partner withdraw from the business, or engage in other concerns, or assign his interest in the partnership to the other partners, or do any act which is either injurious to the partnership or inconsistent with his duties as partner, there will be a dissolution. The circumstances which will render it lawful for a partner to dissolve by tacit renunciation will depend on the terms of the contract, if it be a partnership at will or for a limited time, and these have already been detailed. A voluntary assignment of all the rights, titles, and interest in the property of the partnership, would necessarily cause a dissolution, inasmuch as it gives rise to a state of things altogether incompatible with the prosecution of a partnership concern.[1] A dissolution of partnership would also accrue from an involuntary assignment, or an assignment under a judicial process. When a creditor takes out an execution against the separate share of a partner, there would be a dissolution, because the purchaser is not bound to become a partner, nor are the other partners bound to admit him into the partnership. In case of gross misconduct, or want of good faith and due diligence, or where the authority of a partner is exercised in such way as may cause serious and permanent injury to the success of the partnership—as where there is habitual intoxication or reckless speculation—the court would decree a dissolution.[2]

192. The loss or extinction of the business which formed the object of the partnership would have the same effect of dissolution. This, however, may occur only where the partnership was formed for one single object, or where there was a joint transaction only. Again, where it is utterly impracticable to carry out the undertaking,[3] or where one of the partners becomes unable to act either from sudden illness or other physical causes, although the partnership was agreed for a

[1] Heath *v.* Sansom, 4 B. & Ad. 175. Fox *v.* Hanbury, Cowp. 445. Marquand *v.* N. York Manuf. Co., 17 John, 525.

[2] Loscombe *v.* Russell, 4 Sim. 8. Goodman *v.* Whitcombe, 1 Jack & Walk. 569.

[3] Waters *v.* Taylor, 2 Ves. & Beavan, 299.

fixed period, the law as well as common reason adjudgeth the partnership to be dissolved.[1]

193. Insanity is a good ground to put an end to the partnership, because it not only disables the partner from giving any assistance to the partnership, but prevents him from watching over the affairs for his own safety.[2] But, in order to justify dissolution on account of insanity or other disease, such disease must be habitual or permanent, and not of a temporary character. A broken leg, or an accidental blow, may incapacitate the partner for a time as much as insanity, and the one may be as temporary as the other. Moreover, insanity does not, *per se*, amount to a dissolution; it only gives a good cause to a court of equity to decree dissolution; and one partner cannot, on account of the lunacy of another, put an end to the partnership.

194. Partnership would be dissolved when a single woman marries, because she ceases thereby to have control over her own property.[3] The insolvency or bankruptcy of any of the partners would also cause a dissolution, inasmuch as all the acts of a bankrupt are void from the day of his bankruptcy, and his property vests at once in his assignees, who cannot carry on any trade. The dissolution of the partnership by the bankruptcy of one partner, takes effect from the declaration of bankruptcy by commission, and from the time when the act of bankruptcy was committed.[4] Bankruptcy of one of the partners will not only dissolve the partnership with regard to himself, but even with regard to the solvent partners. The insolvent partner ceases to exercise any control or disposition over the joint property, and the assignee becomes a tenant in common with the other partners. But the control or disposition over the joint property continues to be exercised by the solvent partners,[5] and they must apply it in liquidation of the part-

[1] Baring *v.* Dix, 1 Cox, 213. Pearce *v.* Pearce, 17 Ves. 1.

[2] Sander *v.* Sander, 2 Coll. C. & C. 276. Sayer *v.* Bennet, 1 Cox, 107. Wrexham *v.* Huddleston, 1 Swanst. 514. Jones *v.* Noy, 2 M & K. 125.

[3] Nerot *v.* Burnand, 4 Russ. 247. Griswold *v.* Waddington, 15 John, 57.

[4] Dutton *v.* Morrison, 17 Ves. 193.

[5] Morgan *v.* Marquis, 2 Com. L. Rep. 277. 9 Exch. 145.

nership debts. The insolvent partner is, moreover, divested of all right of action. All actions are henceforth brought in the joint name of the solvent partner and the assignee of the bankrupt; but in all actions against the partners, the name of the bankrupt partner must be included. When an execution issues against one of the partners, an account is made out of the whole estate, and the joint creditors are paid, *pari passu*, out of the joint estate, and the residue is distributed according to the interest of the partners. The interest of each partner is his share of the surplus, subject to all the partnership accounts; and that interest only is liable to the execution of the creditors.[1]

195. A partnership is dissolved, *ipso facto*, by death.[2] Even where the partnership is composed of more than two partners, the death of one is sufficient to effect a dissolution among the survivors; and the reason is, the uncertainty as to the person whom death might introduce into the partnership, as such might be the next of kin, or the executor or administrator of the deceased partner, or a creditor taking administration, or any one claiming by representation or assignment from their representatives. Provision may be made in the contract of partnership, by which, in case of the death of either of the partners during the continuance of the partnership, the executor or administrator of the deceased partner may have the option of succeeding to the share of such deceased partner in the business, if he or she think proper. But the option on the part of the representatives of the deceased partner must be accompanied by a corresponding obligation, on the part of the surviving partners, to admit them.[3]

196. In case of death of one of the partners, the property and the disposal of it go to the executors or representatives of the deceased partner, and not to the surviving partner, which is the case in all joint-tenancies, under the rule, *Jus accrescendi inter mercatores locum non habet;* and there is no difference whether the property consists of personal or real

[1] Aspinall *v.* L. & N. W. Railw. Co. 22 L. T. 75.

[2] Wulliamy *v.* Noble, 3 Mer. 610. [3] Holland *v.* King, 6 C. B. 727.

estate, or of both. The surviving partner holds the partnership funds for the partnership debts, and a right to wind up the partnership concern is by law vested in him.[1] The balance, if any, is distributed equally between the representatives of the deceased partners and the survivors. It is only the share of such balance belonging to the deceased partner which goes to the representative; but he has a right to insist that the partnership effects shall be applied to the payment of the debts of the firm, because the share of the deceased partner may eventually be made liable for any deficiency. He has, however, no interest in the question as to what debts shall be paid first, in case the partnership effects are insufficient to pay the whole. Again, the surviving partners have no power to dispose of the share belonging to the executors of the deceased partner, in order to pay the debts which are due principally from themselves, or in order to enable them to continue their trade. The power intrusted to the surviving partner to deal with the property is only to pay partnership debts, and to wind up the partnership concern. From the moment one of the partners dies, his estate ceases to be liable to the debts subsequently contracted by the surviving partners, even where no notice has been given. The surviving partner must immediately put an end to all transactions, and cease altogether from carrying on any business on the partnership account; and from that moment the surviving partner and the representatives of the deceased partner become tenants in common of all the partnership property and effects in possession.

197. A partnership has been held, by the courts of the United States of America, to be dissolved by public war between the countries in which the partners respectively reside, inasmuch as all commercial relations with the enemy being thereby at an end, partners thus situated are, by operation of law, prevented from carrying out the object of the partnership, and the trade itself in which they were engaged ceased to exist.[2]

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[1] Collins *v.* Young, 21 L. T. 25.

[2] Griswold *v.* Waddington, 15 John, 57; 16 John, 438 Story on Partnership, § 316. The Vigilantia, 1 Rob. 1. The Franklin, 6 Rob. 127.

Section XV.—EFFECTS OF DISSOLUTION AS AMONG THE PARTNERS.

198. The dissolution of a partnership, whether it be by effect of time, the death or bankruptcy of one partner, or the mere will of the partners, has the immediate effect of revoking the mutual power of partners to bind each other by their contracts, to buy or to sell, to dispose of the partnership property, to sign bills of exchange in the name of the firm, or to do any act which they were authorized to do in virtue of the partnership connexion, and in furtherance of partnership affairs. Yet there are certain powers and duties still existing after dissolution; there are engagements which cannot be fulfilled during the existence of the partnership. Time is, under any circumstances, requisite for the purpose of winding up the affairs, of taking and settling all its accounts, and converting all the property, means, and assets of the partnership, existing at the time of the dissolution, as beneficially as may be, for the benefit of all who were partners, according to their respective shares and interests.[1]

199. Each partner has a right to demand that the partnership funds and effects shall be employed to the discharge of partnership debts. The liabilities of the partnership must first be discharged,[2] and then, if there be a surplus of capital and profit, it will be divided among the partners according to their proportion of interest. If, on the contrary, there be a deficiency, a call will be made upon all the partners to make up that deficiency according to their proportions. A partner has no right to trade on his own exclusive account with the partnership property; and should he so trade, in case of profits, he would be accountable for them to the other

[1] Harvey *v.* Crickett, 5 M. & S. 336. 2 Bell's Comm. b. 7. c. 2. p. 643, 5th ed. Story, 328.

[2] Kilgour *v.* Finlayson, 1 H. Bl. 155. Abel *v.* Sutton, 3 Esp. 108. Bell's Principles, 387.

partners, whilst in case of loss, it would fall on himself alone. If, in the management of the partnership funds for the purpose of winding up the concern, a partner should exceed his authority, or waste or misapply the funds, then the Court of Equity will appoint a manager to wind up the concern. Each partner may insist on a sale, as the best criterion of the value of the property.[1] The common property thus converted, and the proceeds of the partnership effects when collected, form a fund over which the creditors of the concern have a primary and preferable claim, and it must be so applied before any partner, or the assignees of deceased partners, can claim any share. A partner cannot set a value on the partnership stock, and force the others to take their proportion of it at that valuation, or to take it out of the premises. Their rights are precisely equal, to have the whole concern wound up by a sale, and division of the produce.

200. In taking an account between the partners themselves, the state of the stock is to be taken as it was worth at the time of the dissolution, and the proceeds thereof until it is got in. Each partner is to be allowed whatever he had advanced to the partnership, and to be charged with what he has failed to bring in, or has drawn out, more than his just proportion, and also with all the debts and claims which he owes or is accountable for to the partnership, with all interest accruing on the same debts and claims. If a partner has made advances to the partnership, the sum only constitutes an item in the account.[2] Where the partnership advances a sum to an individual partner, his profits are first answerable for that sum; and if his profits are not sufficient to answer it, the deficiency is made good out of his capital; and if both his profits and his capital are not sufficient to make it good, he is considered a debtor for the excess. The partners are to be allowed equal shares of the profits and stock, if there be no other engagement settled. When the

[1] Story on Partnership, 350. Crawshay *v.* Maule, 1 Swanst. 495. Collyer on Partnership, pp. 204—214. Regden *v.* Pierce, 6 Madd. 353.

[2] Richardson *v.* Bank of England, 4 Mylne & Craig, 165.

partnership is dissolved by the death of both or all the partners, the court of equity may appoint a receiver.

Section XVI.—EFFECTS OF DISSOLUTION WITH RESPECT TO CREDITORS.

201. The creditors have a right to sue at any time, and by judgment and execution they may obtain possession of the property; but till then they cannot prevent the partners from effectually transferring *bonâ fide*, for a valuable consideration, the property of the partnership. So long as the partnership is solvent, a partner may convey all his property to his copartners previous to a dissolution, and his creditors could not arrest the property in their hands. But, in all such cases, an assignment of the whole estate would only be valid where there has been an absolute *bonâ fide* sale, or a present advance has been given to the full amount of the property, and provided also the transfer or assignment is complete.[1] The creditors have no right of lien upon the partnership effects, but they have power only to sue, and by process create a demand that would directly attach upon the property. As we have already seen, however, each partner has an especial lien on the partnership effects for the payment of the partnership debts, and this lien may be made available for the benefit of creditors. In case of death of a partner, creditors may, without being compelled to pursue the surviving partners in equity, resort to the assets of the deceased partner, because then a partnership debt is several and joint, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, shall appear upon the partnership accounts to be due from the surviving partners to the estate of the deceased partner.[2] If the estate of the deceased partner is not sufficient to pay all his separate debts and all the joint debts, joint creditors will have a right of priority

[1] Sea and Life Assurance Society, *ex parte* Harvey in re Collins, 2 Eq. Rep. 278. [2] Heward *v.* Wheatley, 19 L. T. p. 293.

over the joint estate, and separate creditors a right of priority over the separate estate.[1]

202. The consequences of bankruptcy of a partnership to the right of the creditors are similar to those arising from death. If the partnership becomes bankrupt, all the joint and all the separate property will vest in the assignees, whether the commissions are joint or several. If a separate commission issue against one partner, his assignees will take all his separate property, and all his interest in the joint property. If a joint commission issue against all, the assignees will take all the joint property, and all the separate property of each individual partner. In the distribution to creditors, it is necessary to see the nature of the rights of creditors, as to the execution of their debts before bankruptcy. The separate creditor, that is, the creditor of one of the partners on his individual account, will be restrained from resorting in the first instance to his debtor's share of the joint property, and the joint creditor, or the creditor of the partnership, will also be restrained from resorting in the first instance to the separate property of his debtors. But, although the joint creditors and separate creditors are not allowed to come in, *pari passu*, upon the joint and separate estate of a bankrupt, joint creditors will be admitted to prove under a separate commission of bankruptcy, for the purpose of assenting to or dissenting from the certificate. In Scotland, upon the bankruptcy of a partnership, the separate estates of the co-partners are applicable to the payment, *pari passu*, of the respective separate debts, and of the partnership debts. As the partnership fund is altogether distinct from the separate property of the co-partners, where a partner becomes bankrupt, the creditor of the partnership, in claiming upon the sequestrated estate of a bankrupt partner, must deduct from the amount of his claim the value of his right to draw payment from the company's funds, and he is ranked as a creditor only for the balance. Thus, in a case where the estates of a party carrying on

[1] Gray *v.* Chiswell, 9 Ves. 118. 3 Kent's Comm. Lect. 43, p. 65. Murray *v.* Murray, 5 John, 60.

business in Scotland, but who was also a partner of an English company, were sequestrated, it was held that a creditor of the company was entitled to be ranked upon his sequestrated estate *pari passu* with his personal creditors, according to the Scotch law of ranking, though by the law of England company-creditors are not entitled to rank upon the estate of an individual partner, till his personal creditors have been fully paid.[1]

[1] Lusk *v.* Elder, 5 D. 1279, Shaw's Digest, vol. iii.

CHAPTER III.

ON CHARTERED AND TRADING COMPANIES.

Section I.—NATURE AND ORIGIN OF JOINT-STOCK COMPANIES.

203. A Joint-stock Company is a partnership, and differs from common partnerships only in the large number of partners of whom it is composed, which rendered it essential that the authority of shareholders be somewhat restricted, and special powers be granted to the directors. Joint-stock companies are of modern origin; the ancient companies, such as the East India Company, or the Russia Company, having no joint-stock, each member trading on his own account and risk. Joint-stock companies are formed for the accomplishment of undertakings for which individual capital and enterprise are inadequate, and where the risk is beyond that usually incurred in private trading. And, inasmuch as such undertakings are generally of a permanent character, requiring a permanent supply of funds, it became expedient to allow persons to invest and to withdraw their capital in them: hence the transfer of shares. A fatal abuse, however, was soon introduced: the transfer of shares became itself a trade, and Companies were formed for the single object of creating shares, upon which speculative transactions were largely carried on, regardless of the possible results of the undertaking itself; until, after having reached an exorbitant price, the shares were thrown into the market, and the whole loss fell on the unfortunate last purchaser. Of such companies, the South Sea Company was the most conspicuous representative, its

origin and management being alike founded on deception and fraud, the extent of which all but endangered a national bankruptcy. To administer a sufficient remedy to practices so dangerous to the public good, the Bubble Act was passed,[1] which rendered illegal and void the acting or presuming to act as a corporate body, the raising or pretending to raise transferable stock, and the transferring, or pretending to transfer or assign, any share in such stock, without legal authority. But the statute remained a dead letter, and was at last altogether repealed. With the growing extension of commerce, joint-stock companies increased in number and importance; the powers of the Crown to confer the privileges of incorporation by charter were enlarged; and the legal position of joint-stock companies was settled by an act of the legislature, establishing a system of registration, together with regulations as to the rights and liabilities of directors and members, and the mode of suing and being sued in the name of the officers of the company.

Section II.—COMPANIES BY LETTERS PATENT OR CHARTER.

204. Upon the repeal of the Bubble Act,[2] and with a view to grant certain corporate privileges to trading associations, without limiting in all cases the liability of their members, it was provided that, in any charter of incorporation hereafter to be granted, it might be lawful for the Crown to declare that the members of such corporation should be individually liable, in their person and property, for the debts, contracts, and engagements of the corporation, to such extent and subject to such regulations and restrictions as might be deemed fit and proper. These provisions were afterwards embodied in a special statute,[3] by which her Majesty was authorized to grant the privileges of corporation to any company, by letters patent, although not incorporated. It was thereby provided that all suits and proceedings at law

[1] 6 Geo. I. c. 18, § 19. [2] 6 Geo. IV. c. 91. [3] 1 Vic. c. 73, § 2.

or equity, by or against such company, may be commenced and prosecuted in the name of one of two officers appointed to sue and be sued on behalf of such company, and duly registered;[1] and that the members of such company shall be individually liable for the debts, contracts, and engagements of the company, to such extent only per share as shall be declared in the letters patent.[2]

205. In order that the company may be entitled to such privileges, it must be formed by a deed of partnership, which should set forth the name or style of the company, the names of the members thereof, the date of the commencement of the partnership, the business for which the company is formed, and the principal or only place for carrying on such business. The deed must also contain the appointment of two or more officers to sue and be sued on behalf of the company; and the capital must be divided into a certain number of shares.[3] The company is required, within three months after the date of the letters patent, to make a return to the Enrolment Office of all the particulars set forth in the deed, the number of shares, and the amount for which each shareholder is liable;[4] and no change can be made in the name or style of the partnership during the time it shall be so registered.[5] A return must also be made in case any person should cease to be a member of the company, or in case of the addition of any person thereto, or of the change of any member by marriage or otherwise.[6] On the transfer of any share in the company, a notice in writing must be sent to the company.[7] The returns, as required by the act, are to be made in the Enrolment Offices of the Court of Chancery of England and Ireland, and in the General Register Office in Edinburgh, for Scotland, where such returns are enrolled in alphabetical order; and any person is at liberty to inspect such books and index, and, on payment of certain fees, to require certified copies of the returns, which certified copies are received as evidence in all the courts.[8]

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[1] 1 Vic. c. 73, § 3. [2] Ibid. § 4. [3] Ibid. § 5.
[4] Ibid. § 6. [5] Ibid. § 7. [6] Ibid. § 8.
[7] Ibid. §§ 9, 10. [8] Ibid. §§ 13 to 18.

206. No person becoming a member of such companies, by the transferring of any shares, can be entitled to any proportion of the profits, until he is able to prove the transfer by the registered return;[1] and no person ceasing to be a member, by the transferring of any share, or by death or otherwise, ceases to be liable, until a return of the transfer or other fact be duly registered.[2] Any suit or proceedings commenced in the name of the officers, or of some member of the company, are not abated or prejudiced by the death, or removal, or resignation of such officer, or by any change in the members of such company.[3] All judgments obtained against such officers or members have the same force against the property and effects of the company, and also against the person, property, and effects of the individual members, as if all such had been parties to the suit; but where the liability has been limited by charter, no execution can be issued against any individual member for a greater sum than the residue, if any, of the amounts for which such individual is liable in respect to the shares he held in the company, after deducting the amount which he shall have advanced or paid.[4]

207. The bankruptcy or insolvency of any officer or member of such company is not construed to be the bankruptcy of the company; and the property and effects of the company, as well as of the individual members, as the case may be, remain liable to execution or diligence in the same manner as if such bankruptcy had not taken place.[5] In all cases of summons or notice to be served upon the company, it is sufficient to serve it on the clerk of the company, or at the head office for the time being, or to any agent of such company; and any summons by the company may be given in writing by the clerk, secretary, or attorney for the time being, without being required to be under the common seal of the company. In case of dissolution of such company, it is nevertheless considered as subsisting, so long as any matter relating to the company remains unsettled, and for the purpose of winding up the concern; and it may sue and be

[1] 1 Vic. c. 73, § 20. [2] Ibid. § 21. [3] Ibid. § 22.
[4] Ibid. § 24. [5] Ibid. § 25. [6] Ibid. §§ 26, 27.

sued till such winding up is completed.[1] The duration of charters of incorporation may be limited for any term or number of years, or for any other period whatsoever; and in any charter of incorporation, the corporation thereby formed, and the officers and members thereof, may be made subject to the liabilities imposed on or required from any unincorporated company, or its officers or members; and such charter may also confer on such corporation, or its members and officers, all the powers or privileges which may be conferred on any unincorporated company, or its officers or members.[2]

Section III.—PROGRESS OF JOINT-STOCK COMPANIES.

208. The development of commercial enterprise, which received of late an unprecedented stimulus by the progress of discoveries, the useful application of inventions, and the manifold adaptations of scientific processes, and also by the extension of intercourse with regions hitherto separated from the European family, cannot be better illustrated than by a description of the numerous joint-stock companies which were formed in the United Kingdom during the last ten years. During this period, we have experienced a succession of years of much commercial excitement; differing materially from any antecedent ones, in its being directed to the promotion of numerous undertakings, which have exercised a powerful influence in promoting the progress of civilization, the improvement of morals, and additions to individual comfort. When we consider the extension of life and fire insurance, and their wonderful influence in eliciting habits of providence and foresight; and of railways, which have effected so material an alteration in the habits of the people, and have rendered the metropolis of almost every country easily accessible to all nations; the introduction of gas-lighting, one of the greatest economical improvements of the present century; and the recent important gold discoveries, which are likely to produce a great alteration in the value of the precious metals; together

[1] 1 Vic. c. 73, § 28. [2] Ibid. § 29.

with the unprecedented amount of capital embarked in all kinds of public undertakings, it will readily be acknowledged that the decennium which has just elapsed forms one of the most momentous epochs in the annals of commercial history. The annexed tables show, first, the number of joint-stock companies registered according to the statute of 1844; the number of those provisionally registered—that is, of those projected, and for which the promoters have gone through the preliminaries required by the statute; and the number of those companies completely registered, in each year, from 1844 to 1853, both inclusive; and secondly, the amount of capital of each kind of companies.

209. The tables indicate also a large disproportion between the number of railway companies provisionally registered and those completely registered, viz. 1,534 to 26: this is, however, partly owing to the circumstance that railway companies, by obtaining a special act of parliament, do not require to be completely registered; and therefore it does not appear, from the register of joint-stock companies, how many projected railway companies were carried through, and obtained an act of parliament. In the other cases, the difference between the number of companies completely registered and those provisionally registered, indicates generally the number of companies which proved abortive, or were not proceeded with after provisional registration; from which it is evident, that a good proportion of the schemes which are constantly being projected die still-born. As to capital, taking the companies collectively, it seems that one-third of them were formed with a capital not exceeding 5,000*l.*; one-ninth, from 5,000*l.* to 10,000*l.*; one-fourth, with a capital from 10,000*l.* to 50,000*l.*; one-ninth, from 50,000*l.* to 100,000*l.*; and one-ninth, from 100,000*l.* to 500,000*l.*; and only a small proportion 500,000*l.* and upwards. The table of the provisionally and completely registered companies, and that compared to the capital of such companies, agree in their totals; but there is some difference in the number of each kind, owing to the difficulty of classification.

COMPANIES PROVISIONALLY AND COMPLETELY REGISTERED,

FROM 1844 TO 1853, BOTH INCLUSIVE.

NATURE OF COMPANY.	1844.		1845.		1846.		1847.		1848.		1849.		1850.		1851.		1852.		1853.		TOTAL.	
	P.R.	C.R.	P.R.	C.R.	P.R.	C.R.	P.R.	C.R.	P.R.	C.R.	P.R.	C.R.	P.R.	C.R.	P.R.	C.R.	P.R.	C.R.	P.R.	C.R.	P.R.	C.R.
1. Assurance Companies, including all branches of Insurance	4	—	44	5	24	15	27	19	22	15	41	15	28	12	39	18	57	26	34	23	320	148
2. Railway Companies, including Companies for subsidiary purposes connected with Railways	81	—	1149	4	59	12	22	3	5	1	5	2	12	—	23	—	91	1	87	3	1534	26
3. Gas Companies	7	—	60	17	32	28	26	23	20	21	15	16	19	17	22	12	44	23	52	40	297	197
4. Companies for all other Public Works	13	—	72	2	26	4	11	6	4	1	25	3	24	4	28	2	38	8	21	4	262	34
5. Mining Companies; including Gold, Copper, Lead, and Coal Mining, and Stone and Slate Quarrying; and Smelting Companies	—	—	24	6	12	5	11	6	10	4	21	7	13	4	25	12	54	16	31	18	201	78
6. Companies for conducting Manufactures, working Patent Inventions, &c.	—	—	—	9	—	10	22	9	6	4	11	6	14	1	27	5	36	10	24	9	140	63
7. Shipping and Steam Navigation Comps.	3	—	24	5	10	5	8	6	6	3	6	2	7	5	11	1	27	6	20	10	122	43
8. Land Conveyance Companies, other than Railways	—	—	—	—	14	1	9	2	2	—	1	—	—	—	6	—	9	3	3	—	44	6
9. Fishing Companies	—	—	—	—	—	1	—	—	3	—	1	1	3	—	—	—	—	—	3	—	10	2
10. Trading Companies	—	—	—	—	—	4	7	1	2	2	—	1	—	2	2	—	3	1	8	3	22	14
11. Companies for the Use and Occupation of Land, for Aiding Emigration, and for Improving the Dwellings of the Poorer Classes	1	—	9	—	8	—	6	—	2	—	1	—	2	—	1	—	2	—	10	—	42	—
12. Companies for establishing Buildings of a Public Character	4	—	8	1	6	4	13	5	10	6	18	12	13	5	8	9	12	9	18	7	110	58
13. Building Companies	1	—	12	4	11	9	10	4	5	—	3	—	3	1	—	1	2	1	5	—	52	20
14. Investment and Loan Companies	1	—	20	4	14	10	11	5	8	2	5	2	6	5	5	2	9	1	2	3	81	34
15. Miscellaneous Companies, not reducible under any of the foregoing heads	4	—	98	—	76	4	32	9	18	4	12	1	15	1	14	1	30	5	21	4	320	29
TOTAL	119	—	1520	57	292	112	215	98	123	63	165	68	159	57	211	63	414	110	339	124	3557	752

P. R.—Provisionally Registered. C. R.—Completely Registered.

AMOUNT OF CAPITAL.

Nature of Company.	None.	Not exceeding £5,000.	£5,000, and not exceeding £10,000.	£10,000, and not exceeding £50,000.	£50,000, and not exceeding £100,000.	£100,000, and not exceeding £500,000.	£500,000, and not exceeding £1,000,000.	Above £1,000,000.	Total.
1. Assurance Companies; including all branches of Insurance	28	2	12	37	42	23	9	3	156
2. Railway Companies; including Companies for subsidiary purposes connected with Railways	—	—	—	2	—	7	3	4	16
3. Gas Companies	—	141	23	19	4	3	—	—	190
4. Companies for all other Public Works	—	15	7	7	1	4	—	—	34
5. Mining Companies; including Gold, Copper, Lead, and Coal Mining, and Stone and Slate Quarrying; and Smelting Companies	—	4	9	36	16	11	1	—	77
6. Companies for conducting Manufactures, working Patent Inventions, &c.	—	9	7	21	11	17	1	—	66
7. Shipping and Steam Navigation Companies	—	6	5	19	3	8	—	—	41
8. Land Conveyance Companies, other than Railways	—	2	—	2	1	2	—	—	7
9. Fishing Companies	—	—	—	2	—	—	—	—	2
10. Trading Companies	—	4	—	2	1	—	—	—	7
11. Companies for the Use and Occupation of Land, for Aiding Emigration, and for Improving the Dwellings of the Poorer Classes	—	—	—	—	—	—	—	—	—
12. Companies for establishing Buildings of a Public Character	—	49	7	3	—	1	—	—	60
13. Building Companies	—	7	3	10	—	1	—	—	21
14. Investment and Loan Companies	—	4	5	18	2	1	1	—	31
15. Miscellaneous Companies, not redueible under any of the foregoing heads	—	10	8	16	4	6	—	—	44
Total	28	253	86	194	85	84	15	7	752

The Author is indebted for the above Tables to the kindness of George Taylor, Esq. Assistant-Registrar of Joint-Stock Companies, author of a work on Joint-Stock Companies.

Section IV.—JOINT-STOCK COMPANIES ACT.

A.—*Registration of Joint-Stock Companies.*

210. The Joint-Stock Companies Act has for its object the registration, incorporation, and regulation of joint-stock companies; it applies to all joint-stock companies for any commercial purpose, or for the purpose of assurance, and to every partnership, established in England and Ireland, which at its formation, or by subsequent admission, consists of more than twenty-five members, the capital of which is divided into shares, transferable without the express consent of all the co-partners.[1] The act, however, does not apply to banking companies, schools, literary institutions, and friendly societies, except such as make assurances for lives to an amount exceeding 200*l.* upon one life, loan societies, and benefit building societies, which are regulated by special statutes:[2] nor does it extend to mining companies on the cost book principle,[3] nor to Irish anonymous partnerships,[4] nor to any companies for executing bridges, roads, railways, canals, &c. &c., nor to any companies incorporated by statute or charter, or any companies authorized by statute or letters patent to sue and be sued in the name of some officer or person.[5]

B.—*Provisional Registration.*

211. Before any prospectus, handbill, or advertisement can be issued for the purpose of forming an association coming within the definition of a joint-stock company, the promoters must make a provisional registration of, at least, the proposed name and business of the intended company, and the names and addresses of the promoters of it.[6] Such duty devolves on the promoters themselves; except, however, where they have appointed an attorney or solicitor for the company, in which case it is his duty to effect such a registration, and he becomes

[1] 7 & 8 Vict. c. 110, § 2. [2] Ibid. § 2. [3] Ibid. § 63.
[4] Ibid. § 64. [5] Ibid. § 2. [6] Ibid. § 2.

liable for the neglect of it.[1] It is also prescribed that no money shall be taken or deposited on the allotment of shares, or on scrip, and that no contract shall be made in the name of the company, before a certificate of complete registration has been obtained.[2] A company provisionally registered is entitled to act provisionally for twelve months, but not for any longer period, unless the certificate is renewed. During the time of provisional registration, the promoters of a company are entitled to assume the name of the intended company, but coupled with the words "registered provisionally;" to open subscription lists; to allot shares, and receive deposits at a rate not exceeding 10*s.* per cent. on the amount of every share; and, in the case of companies for public works, to receive such further sums per cent. on the amount of the shares as may be required by the standing orders of the houses of parliament; and to perform any other acts that are necessary for constituting the company, or for obtaining a charter or act of parliament; but not to make calls, nor to purchase, contract, or hold lands, nor to contract for any service, nor for the supply of any stores, except such as are necessary for the establishing of the company.[3] Provisionally registered companies are also required to make periodical returns of the place of business or of meeting, the names of the committee or directors, of the officers and subscribers, the proposed capital, the number of shares into which it is divided, and the amount of each share, and every change in any of the above particulars as it takes place:[4] such returns to be made by the promoters of the company, or by their attorney or solicitor.

C.—*Liability of Promoters of Companies Provisionally Registered.*

212. The liability of promoters of companies extends, first, to all the penalties imposed by the act for failure of making the requisite returns. The promoters of a company are all

[1] 7 & 8 Vict. c. 110, § 6. [2] Ibid. § 24. [3] Ibid. § 23.
[4] 10 & 11 Vict. c. 78, §§ 5, 6.

those who act in the formation of it as provisional committee-men; but it is not sufficient that the name be allowed to be placed on the provisional committee, and that it be inserted and published in a prospectus, to charge a person with liability for contracts entered into by the other members of it: if, however, he attends a meeting of the committee, or does any act in relation to the proposed company, he then becomes liable for goods supplied after the date of such consent. The principles which govern the liability of provisional committee-men are as follow:—First, whoever acts as promoter or member of the provisional committee of any company, is liable on all contracts entered into by himself, or by any third party, under an authority, special or general, from him; Secondly, such authority will not be presumed from the mere fact of his having consented to act as a promoter or member of the provisional committee, but must be established by evidence of such act on his part as will be held to constitute an authority, special or general; and, Thirdly, that if he has, by words or conduct, represented himself as having given such authority, and if the contract has been truly entered into on the faith of his representation, he will be stopped from disputing the truth of it, and will be liable as if the authority had been directly established.[1]

213. The subscribers to a joint-stock company are understood to consent to take shares in the concern, provided the terms of the prospectus shall be fulfilled: therefore, if the projected operation should prove abortive, the subscribers would be entitled to have back the whole of the money advanced, and the expenses incurred must be supported by the promoters of the company, unless what was promised in the prospectus was actually carried out. A railway company was provisionally registered, and the prospectus was issued, which stated the proposed capital to be 2,000,000*l.* in 80,000 shares of 25*l.* each. Mrs. Walstab applied to the provisional committee for seventy shares, or any less number they might

[1] Taylor on Joint-Stock Companies.

allot to her, agreeing to pay the deposit of 2*l.* 12*s.* 6*d.* per share, and to sign the parliamentary contract and subscriber's agreement when required. To this letter she received an answer, signed by the secretary, stating that the committee of management had allotted to her thirty shares, and requesting her to pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into a bank, on or before a day mentioned. Mrs. Walstab paid the deposit of 78*l.* 15*s.* and received the banker's receipt for the same. She afterwards presented the receipt to the company, and made several fruitless applications to the committee for scrip; and at length was informed that the directors had come to the resolution not to issue any scrip, and that a greater part of the deposit had been expended, and the balance would be rateably divided. It appeared that the directors, finding it impossible to go to parliament in the ensuing session, had determined not to issue any scrip, and that of the entire number of 80,000 shares, 70,000 were allotted, but deposits were paid on 4,000*l.* only, producing altogether the sum of 10,500*l.* Mrs. Walstab, failing to get scrip or her money again, brought an action against the directors; and it was decided that, the concern having been abandoned, the directors could not claim to retain that which was paid for a specific purpose, and that she was entitled to recover back the whole sum so paid by her.[1] If, however, it be shown that, although the original project proved abortive, or the managers carry on the undertaking on a different footing, or with a less capital, the subscriber has acquiesced in their so doing, or authorized the directors to proceed in the management of the concern, then he would become answerable for their future contract.[2] As regards the liability of provisional committee-men, *inter se*, for any work or service done by any one member of the provisional committee, no liability would be incurred by the other members, as they all stand in the capacity of joint adventurers, and all are pre-

[1] Walstab *v.* Spottiswoode, 15 M. & W. 501.

[2] Per Lord Abinger, C. B. Pitchford *v.* Davis, 5 M. & W. 2.

sumed to act, or to contribute their labour, for the advancement of the concern in which they are jointly interested. So in the case of a railway company, a surveyor, who became subsequently a shareholder in the company, could not maintain an action against the co-projectors for work done in furtherance of the undertaking.[1]

214. The managers of a projected company are bound to render to the subscribers an account of the monies received, and the expenses incurred,[2] and to apply the funds in their hands to the liquidation of the liabilities of the company; the managers being liable for any work done or money given by any subscribers on behalf of the company.[3] But while the promoters are bound to do all that on their part was to be done, they have also a right to sue the subscribers for the sum they have agreed to subscribe, or for the deposits which they were to make on the allotment of the shares,[4] provided, however, the directors acted *bonâ fide*, and the contract for the allotment of shares was complete. In order to prevent the fraudulent system of companies pretending to be patronised, or directed, or managed, by eminent or opulent persons, any person making such false pretences, knowing the same to be false, in any advertisement or other paper, whether printed or written, and whether published in any newspaper or handbill, or placard or circular, a forfeit of a sum not exceeding 10*l.* is incurred for every such offence.[5] And wherever the directors sanction the publication of false statements, either concerning the amount of the capital subscribed, or the number of shares allotted, or as to the actual condition of the company, they could not support an action for the payment of deposits, against those who were induced to become shareholders under such false impression. Until the company has been completely registered, no shares can be sold or mortgaged.

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[1] Parkyn *v.* Fry, 2 C. & P. 311. Holmes *v.* Higgins, 1 B. & C. 74.
[2] Cooper *v.* Webb, 15 Sim. 454. [3] Colley *v.* Smith, 2 M. & Rob. 96.
[4] Duke *v.* Dive, 1 Exch. 36. Duke *v.* Forbes, 1 Exch 356.
[5] 7 & 8 Vict. c. 110, § 65.

D.—*Complete Registration.*

215. A provisionally registered company, to obtain a certificate of complete registration and its attendant privileges, must be formed by deed of settlement, signed by at least one-fourth in number of the subscribers, and who hold one-fourth of the maximum number of shares in the capital, and certified by two directors. The deed must contain the name and business of the company, the principal or only place of business, and every branch office; the amount of the proposed capital, and the means by which it is to be raised; the amount of money to be raised by loan; the total amount of capital subscribed, or proposed to be subscribed, at the date of such deed; the division of the capital, if any, into equal shares, and the total number of such shares, distinguished by a separate number in a regular series; the name, occupation, and residence of the subscribers; the number of shares which each subscriber holds, and the distinctive number thereof; the names of directors or trustees, and auditors; the duration of the company, and the mode, or condition, of its dissolution: the deed must also contain an agreement, on the part of every shareholder, with a trustee on the part of the company, to pay up the instalments on the shares taken by such shareholder, and to perform the several engagements contained in the deed.[1]

216. The effect of complete registration is to constitute the company incorporated from the date of the certificate, for the purpose of carrying on the business, and of suing and being sued, and taking and holding the property of the company, but not to restrict in any wise the liability of the company. By such complete registration the company is empowered to use the registered name of the company, to have a common seal, on which must be inscribed the name of the company, adding thereto "registered;" to sue and be sued by their registered name upon or by any person, whether a member of the company or not; to enter into any contracts for the execu-

[1] 7 & 8 Vict. c. 110, § 7.

tion of the works, and for the supply of stores; to purchase and to hold land in the name of the company or of the trustees; to issue certificates of shares; to receive instalments from subscribers for any shares not paid up; to borrow or to raise money within the prescribed limitations; to declare dividends out of profits of the concern; to hold general meetings; to make bye-laws, and to perform all other acts necessary for carrying into effect the purposes of the company. All bye-laws must be printed and circulated with the seal of the company, and a copy thereof must be given to every officer of the company, and to every shareholder who may require the same: the bye-laws, having the seal of the registrar of the joint-stock companies, are received as evidence in court.[1] The company is also empowered to appoint a number of directors, not less than three, for a period not greater than five years; and also to appoint or remove one or more of the auditors, or any other officer, subject, however, to the provisions of the Joint-Stock Companies Act, or the deed of settlement.[2] No shareholder is entitled to receive any dividends or profits, until he has executed the deed of settlement, and paid all instalments or calls due from him, and the same shall have been duly registered.[3]

E.—*Accounts.*

217. The books of the company are to be kept at the principal or only place of business, and at all reasonable times they are to be open to the inspection of any shareholder; subject to the provisions of the deed of settlement, or of any bye-law.[4] Fourteen days before the period at which the accounts are to be delivered to the auditors, the directors must cause the books to be balanced, and a full and fair balance-sheet to be made up; the same to be examined and signed by at least three directors and the chairman, and entered in the books of the company.[5] The balance-sheet must be produced at the

[1] 7 & 8 Vict. c. 110, §§ 47, 48. [2] Ibid. § 25. [3] Ibid. § 26.
[4] Ibid. § 33. [5] Ibid. § 35.

ordinary meetings of the shareholders, and during fourteen days before and one month after; and at any other time, by the authority of three directors, every shareholder may inspect the books and balance-sheet of the company, and take copies and extracts therefrom.[1] Every joint-stock company completely registered must annually appoint one or more auditors, and return the names of such to the registrar of joint-stock companies; and if such appointment be not made, then, on the application of any shareholder, the Board of Trade may proceed to appoint such auditor.[2] Twenty-eight days before the ensuing ordinary meetings, the accounts must be delivered for examination to the auditors, who have power at all reasonable times throughout the year to inspect the books of the company.[3] Within fourteen days after the receipt of such balance-sheet and accounts, the auditors must either confirm the accounts, and report generally thereon, or, if they do not see proper to confirm such accounts, report specially, and deliver the accounts and balance-sheet to the directors.[4] Ten days before the ordinary meetings of the company, a printed copy of the balance-sheet and auditors' report must be sent to every shareholder, and fourteen days after such meeting, the directors must return a copy of the same to the registrar of joint-stock companies, where it is to be registered and filed.

F.—*Rights of Shareholders.*

218. The directors of every joint-stock company registered, must cause a book to be kept called the register of shareholders, wherein there shall be entered from time to time the names and addresses of all the shareholders, and also the number of shares to which such shall be respectively entitled;[6] such register being left open to the inspection of any shareholder. Under demand of the holder of any shares, the company may cause a certificate of proprietorship of such shares to be delivered to such shareholder, which certificate shall bear

[1] 7 & 8 Vict. c. 110, §§ 36, 37. [2] Ibid. § 38. [3] Ibid. §§ 39, 40.
[4] Ibid. § 41. [5] Ibid. §§ 42, 43. [6] Ibid. § 49.

the common seal of the company; and the same is admitted in all courts as *primâ facie*[1] evidence of the title of the shareholder to the share. Where the certificate is worn out, or damaged, or lost, or destroyed, upon proof thereof, a new certificate may be obtained.[2] Every shareholder may sell or transfer his share, by deed duly stamped; such deed to be entered in a book called the register of transfer, and the entry is to be endorsed on the instrument of transfer: the purchaser not being entitled to the profits of the company, or to vote in respect of the shares, until such instrument shall have been produced at the office of the company; but no transfer can be made, except by provisions to the contrary in the deed of settlement, where the shareholder has not paid up the full amount due to the company.[3] The company may sue any shareholder for the payment of any instalment of capital due upon any share; and the same, together with interest at the rate of five per cent. per annum, may be recovered, in an action of debt, in any court.[4]

G.—*Contracts.*

219. The officers of the company may be authorized by general bye-laws to enter into any contract for any articles worth less than 50*l.*, or for any service, the period of which does not exceed six months, and a consideration for which does not exceed 50*l.*; but all other contracts must be in writing, and signed by two at least of the directors of the company, and sealed with the common seal thereof, or signed by one officer of the company expressly authorized by some minute or resolution of the board of directors applying to the particular case; and in the absence of such requisites the contract would be void, except as against the company in whose behalf it shall be made.[5] With regard to bills of exchange and promissory notes, if the directors of the company, by deed of settlement, or by bye-laws, be authorized to issue or

[1] 7 & 8 Vict. c. 110, §§ 50—52. [2] Ibid. § 53. [3] Ibid. § 54.
[4] Ibid. § 55. [5] Ibid. § 44.

accept bills or notes, then such bills or notes shall be signed, and also endorsed, by two of the directors in behalf of the company, and countersigned by the secretary or other appointed officer; but no personal liability will devolve thereby on such secretary or directors, except as shareholders of the company; and the company on whose account bills or notes are accepted or endorsed may sue and be sued thereon, in the same manner as in the case of any contract entered under their common seal.[1] All deeds and instruments bearing the seal of the company, must be signed by at least two of the directors.[2]

II.—*Liability of Shareholders.*

220. Every judgment against any company completely registered—except such as are incorporated by act of parliament or charter—or companies, the liability of the members of which is restricted, may be enforced, not only against the property of the company, but against the personal property and effects of any shareholder for the time being, or any former shareholder of the company, in his individual capacity, until such judgment shall be fully satisfied; provided such former shareholder was a shareholder of the company at the time when the contract or engagement was entered into, or became a shareholder during the time such contract was unexecuted, or was a shareholder at the time of the judgment being obtained. In no case, however, can execution be issued on such judgment, against the person, property, or effects of any former shareholder, after the expiration of three years next after the person sought to be charged shall have ceased to be a shareholder of the company.[3] In Scotland, persons who were members of a joint-stock company with transferable shares, at the time when a particular debt or engagement was contracted by the company, and were personally liable for such debt or engagement, continue liable to execution in respect of that debt or engagement indefinitely,

[1] 7 & 8 Vict. c. 110, § 15. [2] Ibid. § 16. [3] Ibid. § 66.

though they cease to be members by transfer of their shares.[1] Every person against whom or against whose property execution shall have been issued, is entitled to recover against the company all loss and damages; and, after due diligence used against the property of the company, he will be entitled to contribution for so much of such loss as shall remain unsatisfied, from the other shareholders; and such contribution may be recovered from such persons, in like manner as contributions in ordinary cases of partnerships.[2]

Section V.—COMPANIES FOR PUBLIC WORKS.

221. The provisions usually inserted in the special statutes which govern the formation of companies incorporated for carrying on undertakings of a public nature, are now embodied into a comprehensive statute, under the title of "Companies Clauses Consolidation Act."[3] We shall briefly notice the principal features of this act, omitting those provisions which are found also in the Joint-Stock Companies Act. All shares in public undertakings, such as for the purchase of land to make a canal, though the profits arise out of land, the shares are held to be personal estate, and transmissible as such.[4] The capital is to be divided into shares, and the transfer of shares must be by deed, duly stamped and registered. When the interest on any shares is transmitted by other means than by a transfer, the transmission must be authenticated, as will be more fully described in the case of shares in banking companies.[5] With respect to the remedies of creditors of the company against the shareholders, where, on any execution at law or equity, the property or effects of the company are not found sufficient, the creditors may obtain execution against any of the share-

[1] See Queries of the Mercantile Law Commission, p. 33.

[2] 7 & 8 Vict. c. 110, § 67.

[3] 8 Vict. c. 16.

[4] Ibid. § 5. *Ex parte* Lancaster Canal Company, 1 D. & C. 411.

[5] See 7 & 8 Vict. c. 113, § 26, p. 205.

holders, only to the extent of their shares respectively, in the capital of the company not then paid up.[1]

222. If the company be authorized by special act to borrow money on mortgage or bond, they may do so; and if the money be paid off, the company may borrow again the amount, and so from time to time, under the authority of a general meeting; unless the money be reborrowed in order to pay off any existing mortgage or bond. Every mortgage or bond for securing money borrowed by the company must be by deed, under the common seal of the company, duly stamped, and setting forth the consideration. The mortgagees or obligees will be entitled, one with another, to their respective proportions of the tolls, sums, and premises, comprised in such mortgage, and of the future calls payable by the shareholders, if comprised therein, according to their respective sums in such mortgages, without any preference one above another by reason of the priority of the date of such mortgage, or of the meeting at which the same was authorized. The company will not be precluded by such mortgage from receiving, and applying to the purposes of the company, any calls to be made by them.[2] A register of mortgages and bonds must be kept by the secretary, to be open for the perusal of any shareholder, or of any mortgagee or bond creditor of the company, or of any person interested in such mortgage or bond.

223. Mortgages and bonds may be transferred, but the transfer must be by deed, duly stamped and registered. The interest upon the money borrowed upon such mortgage or bond shall be paid at the periods appointed, or otherwise half-yearly, to the parties entitled thereto, and in preference to any dividend payable to the shareholders of the company. The company may fix a period for the repayment of the money so borrowed; but where no time is fixed, the party entitled to the mortgage or bond may, at the expiration of twelve months, demand payment of the principal and interest;

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[1] 8 Vict. c. 16, § 36. [2] Ibid. §§ 42, 43.

and the company may at any time pay off the money borrowed, on giving the like notice.[1] The company has also power to convert loan into capital, by creating new shares of the company, on the authority of a general meeting; the new shares to be considered as part of the general capital, and subject to the same provisions. If at the time of such augmentation of capital taking place, by the creation of new shares, the old shares be at a premium, then the new shares shall be offered to the shareholders. After the lapse of one month after the offer of such new shares, if the shareholders do not accept them, they may be disposed of by the directors. If the old shares are not at a premium, the new shares may be issued as the company shall think fit.[2] The company has also power to consolidate shares, with the consent of three-fifths of the votes of the shareholders, into a general capital stock, to be divided among the shareholders according to their respective interest therein. The holders of such stock may thenceforth transfer their respective interest in it, causing the same to be regularly registered. They shall also be entitled to participate in the dividends and profits of the company, and to all other privileges and advantages. It is also provided that all the money raised by the company, whether by subscriptions of the shareholders, by loan, or otherwise, shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special act, and all expenses incident thereto, and, secondly, in carrying the purposes of the company into execution.[3]

224. Previously to every ordinary meeting, at which a dividend is intended to be declared, the directors must cause a scheme to be prepared and submitted to the ordinary meeting, showing the profits, if any, of the company for the current period since the preceding ordinary meeting at which a dividend was declared, and apportioning the same among the shareholders; and at such meeting a dividend may be declared, according to such scheme. The company cannot

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[1] 8 Vict. c 16, §§ 50, 51. [2] Ibid. §§ 56—59. [3] Ibid. § 65.

make any dividend whereby the capital stock will be in any degree reduced. Before apportioning the profits to be divided among the shareholders, the directors may set aside such sum as they may think proper to meet contingencies, or for enlarging, repairing, or improving the works connected with the undertaking, or any part thereof, and may divide the balance among the shareholders. No dividend shall be paid in respect of any share, until all calls then due in respect of that and every other share held by the person to whom such dividend may be payable, shall have been paid.[1]

Section VI.—OF MINING COMPANIES, AND COMPANIES UPON THE COST-BOOK SYSTEM.

225. Mining companies may be formed as ordinary joint-stock companies, or on the cost-book principle. The former are regulated by the Joint-Stock Companies Registration Act; the latter principally by a custom prevailing in Cornwall. The cost-book principle of mining has been defined to be, "a mining partnership according to the custom of the stannaries, under which each shareholder is at liberty to transfer his shares to any purchaser without the consent of his co-partners, and to determine his liability at any time by relinquishing his share and interest in the concern, upon giving in either case notice to the purser of the transfer or relinquishment, and requiring him to enter it in the cost-book; under which, also, each shareholder has complete access to all the documents and proceedings of the adventure, the right of controlling the outlay by his vote at the mine meetings in proportion to his shares; and is protected against any risk from involuntary expenditure, by the rule that these undertakings cannot be carried on upon any general credit, but that all accounts must be made up and all expenditure passed at the two-monthly meetings of the partnership, and

[1] 8 Vict. c. 16, §§ 120—123.

calls then made upon the shareholders to defray their proportionate share of such expenditure." [1]

226. Although this mode of forming companies for the purpose of exploring mines, is entirely founded on a local custom prevailing in Cornwall, certain rules or regulations have been generally adhered to for the convenience of such adventurers who may not be familiar with it. The cost-book contains the names of all the shareholders, and the number of shares held by each, and is signed either by all the shareholders, or by the purser as their agent. The purser keeps an account with the adventurers of the disbursements and receipts of the mines, and a monthly balance of account is struck. The shareholders in a mining company, under the cost-book system, are liable for all the debts incurred; and it differs in this respect from common partnerships only in the power of the partner to withdraw at his pleasure, at any of the bi-monthly meetings. Again, the shareholders may, like part-owners in ships, transfer their shares without the consent of the co-partners, it being sufficient to effect such transfer, by entering in the cost-book a simple statement that *A. B.* transferred his share to *C. D.* for a valuable consideration. Such partnerships are, doubtless, formed exclusively by the custom of Cornwall; yet there does not appear any legal hindrance to their being established elsewhere than in Cornwall. In consequence of the power of every shareholder to relinquish his share whenever he thinks proper, upon giving notice to the purser at the two-monthly meetings, he ceases then to have any further responsibility for the debts of the concern, and those who supply goods or materials must look to those who are shareholders at that time.

227. The following cases illustrate how the right of shareholders to withdraw their interest from such companies at any time, by giving notice to the purser, affects the liability of shareholders as among themselves, and with respect to creditors.

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[1] Child's Letter to R. B. Crowder, Esq. M.P. p. 1.

A company was formed in Wales, for working a lead mine on the cost-book principle, called "The Pennant and Craigweir Consolidated Lead Mining Company." The cost-book contained the rules of the association, and the 24th was as follows:—"That any shareholder may determine his or her responsibility or liability, with respect to the affairs of these mines, upon his or her giving notice in writing to the purser of the company for the time being, of his or her desire of retiring from the company, and also upon depositing with the said purser the transfer of the shares, or those held by him or her, and signing a relinquishment of all claims or demands on the company in respect of such share or shares." The Rev. Joseph Fenn became a holder of ninety-eight shares in the company, on the 17th April, 1848, and so continued down to the 4th September, 1851, but he did not sign the cost-book. The first call upon the shares of the company was made on the 3d April, 1848, of 8*s.* per share, authorized by a meeting of shareholders held on that day. By an account laid before a quarterly meeting of the shareholders, held on the 5th June, 1850, it appeared that the assets were 950*l.* 13*s.* 1*d.*, and the liabilities 2,101*l.* 3*s.* 11½*d.*; at the same meeting a call of 10*s.* per share was made; and on the 8th January, 1851, a further call of 5*s.* per share was made. Mr. Fenn received the report of the meeting of the 5th June, 1850, with the account, and the report of the meeting of the 8th January, 1851, and paid both calls. A special general meeting of the shareholders was appointed to be held on the 26th August, 1851, and a circular was addressed to Mr. Fenn, showing the financial state of the company. The meeting was held on the 26th August, and was then adjourned to the 5th September, and notice of the adjournment given to Mr. Fenn. On the 4th September, 1851, the day before the adjourned meeting, Mr. Fenn wrote to the purser of the company a letter of that date, saying, "I beg to inform you, it is my desire to retire from the Pennant and Craigweir Consolidated Lead Mining Company, and thereby relinquish all right and title to the parts or shares standing in my name on the cost-book of the

company." The purser objected to the form of relinquishment, and wanted him to sign a new form, whereby he should consent to bear his share of the liabilities incurred to the end of the present month; but Mr. Fenn refused to sign the new form. The company was ordered to be wound up on the 4th September, 1851, when the debts amounted to 1,730*l.*, for rent, money due to miners, &c. The name of Mr. Fenn having been placed on the list of contributories, the question turned as to the liability of Mr. Fenn. The Master held that Mr. Fenn was still liable as a contributory, in respect of the debts and liabilities of the company existing at the date of his letter of relinquishment; but, on appeal to the Lords Justices, Mr. Fenn's name was removed from the contributories. This judgment seems opposed to the received principle, that the utmost that such relinquishment as Mr. Fenn had sent can effect would be a release of all future debts, while he must remain liable for all those subsisting at the time of the relinquishment, or on the next monthly day for making up the affairs of the mine, when he could and was bound to settle his account with the mine. This is a late case, of considerable importance in regard to the cost-book principle.[1]

228. The next case shows how the interest of creditors may be affected by the transfer of shares by any shareholder. J. Johnson had, by verbal contract, agreed to take shares in a mine conducted upon the cost-book principle, in the county of Cornwall. A little time after, Johnson verbally agreed to transfer his shares to Demont, another partner, or to relinquish them to the rest of the company; and subsequently to this transfer, the superintendent ordered certain goods. The creditor sued Johnson for the debt of the company, objecting against Johnson, that the mere verbal agreement amongst the partners themselves would not affect the rights of third parties, creditors to the mine; and, at least, that

[1] *Ex parte* Fenn, in re Pennant and Craigweir Consolidated Lead Mining Company, 22 L. J. C. C. 692.

some written notification to the purser or other officer, of a change in the adventurers, would be necessary in order to put an end to the liability of a shareholder to such third parties. It was, however, decided that no such formal act was necessary to get rid of Johnson's liability, and that enough had been done to that effect; for he neither held himself out as a shareholder, nor did he authorize any one to pledge his credit.[1]

229. The purser is the agent of the adventurers, and receives a salary at so much per month, and the books are always open to each shareholder. The co-adventurers have not, as in a partnership, an implied authority to bind each other by bills of exchange, or by borrowing money from bankers, nor do they assume an equal degree of authority, but the management is entrusted to certain from among them.[2] Such are the principal features of the cost-book principle.

Any disputes among the co-adventurers are brought before the stannaries court, a local tribunal administered by a judge, and by officers having an equitable and legal jurisdiction.

Section VII.—INSURANCE COMPANIES.

230. We have seen that the Joint-Stock Companies Act includes insurance companies. But these also may be formed by charter of incorporation—by letters patent from the crown, without being incorporated— and by deed of settlement. Incorporated companies are created by royal charter, or by an act of parliament; and their peculiar characteristics, as distinct from unincorporated companies, is the limitation of liability of their members; as it has been said, the law sees only the creature of the charter—the body corporate—and knows not the individuals. The Royal Exchange Assurance, and London Assurance Corporations were the first insurance companies incorporated by royal charter, granted in pursuance of an act of parliament.[3] Insurance offices or companies are constituted

[1] Northey *v.* Johnson, 19 L. T. 104, Q. B.

[2] Ricketts *v* Bennett, 4 Com. B. Rep. 686.

[3] 6 Geo. I. c. 18.

under three different forms. The first is that of a joint-stock company, with a subscribed capital, trading in life assurance contracts, and dividing the profits among the shareholders; the second form is also that of a joint-stock company, with a proprietary capital, but, in addition to the specific sums payable upon the death of the insured, they are allowed to participate to a certain extent in the profits of the concern; the third is that of a mutual insurance office, the members sharing among themselves the entire profits, after deducting the expenses of management. These are called proprietary, mixed, and mutual insurance offices.[1]

231. Unless by charter of incorporation, the liability of the shareholders is unlimited. The fund primarily liable is the accumulated fund derived by the premiums; and, in the case of proprietary offices, the subscribed capital is a guarantee fund, in addition to the personal liability of the shareholders. This liability is generally limited by specific clauses in the deed of settlement and in the policies, the effect of which has been already considered.[2] Insurance companies, formed by private acts of parliament, are not by implication to be held as corporations, and do not thereby obtain the privileges of limitation of liability; in order to prevent the act having such an effect, an express declaration is generally inserted to that effect.[3] All claims against insurance companies incorporated by royal charter, must be enforced against the corporation as such; when formed under the Joint-Stock Companies Act, against the directors signing the policy. In all cases where the policy of insurance is not under seal, claims against the company may be enforced against any of the shareholders, and either of them may be sued separately.[4]

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[1] Bunyon on Life Insurance, p. 114.

[2] See p. 135—137.

[3] *Ex parte* The Newport Marsh Trustees, 16 Sim. 346.

[4] Reid *v.* Allan. See Bunyon, p. 336.

Section VIII.—WINDING UP OF JOINT-STOCK COMPANIES.

232. Several important measures have been found necessary for facilitating the winding up of joint-stock companies, when they are unable to meet their pecuniary engagements, or when they fail to answer the purpose for which they were created; to that effect recourse may be had either to the Court of Bankruptcy, or to the Court of Chancery.[1] Any person claiming to be a contributory in a company, may present a petition for the dissolution of such company in any of the following cases: where there is a declaration of insolvency, in pursuance of a resolution of the board of directors; where the company does not pay, secure, or compound for a judgment debt; where the company disobeys any order or decree for payment of money; where the company shall have been dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding up its affairs, and the same shall not be completely wound up; or if any other matter or thing shall be shown which, in the opinion of the court, shall be a sufficient ground for dissolution.

233. The provisions of the winding up acts regard principally the mode of procedure, which need not be minutely stated. It seems that on an application for the dissolution and winding up of the affairs of a company, the court will take into consideration the particular circumstances of each case; and if, from the materials before the court, it does not appear expedient that the company should be wound up, it will act upon that impression.[2] For example, where a joint-stock company, formed for the insurance of cattle, had sustained heavy losses, and was under liabilities to their insured to a great amount, and many of the shareholders had been allowed to retire from the company, so as to avoid any future liabilities, it was

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[1] 7 & 8 Vict. c. 111. 11 & 12 Vict. c. 45. 12 & 13 Vict. c. 108.

[2] *Ex parte* Pocock, re direct Lond. & Manchester R. Co., 5 Railw. Cases, 607. Chitty's Practical Statutes, vol. i. p. 684.

held that the court was not entitled, under this act, to look into the accounts of the company; and there being none of the tests of insolvency provided by the act, nor any act done which amounted to a dissolution of the company, the court refused to make any order for winding up its affairs.[1] In another case, a company was provisionally registered for making a railway of 170 miles, to complete the communication from London to the western coast of Ireland, and a subscription contract was executed, authorizing the directors, among other things, to apply for an act to construct only a portion of the line, if they thought fit. Afterwards a portion of the scheme was abandoned by the directors, and the deposits applied to procure an act, which was obtained for making a portion of the line, forty miles only. This again was held not a proper case for an order upon the petition of a scripholder under the original agreement.[2] On the contrary, an order for winding up the affairs may be obtained, notwithstanding there are transactions of the company still pending. So the circumstance that policies of a life insurance company are still in force, and that the liabilities of the company upon them cannot be settled for many years, is not sufficient to render it inexpedient to make an order for winding up.[3]

234. The winding up acts apply to all partnerships, associations, and companies, consisting of not less than seven in number, whether incorporated or unincorporated, except railway companies incorporated by act of parliament, or companies formed on the cost-book principle; unless the owner or owners, of one-tenth in value of the shares in such mine, shall present a petition for the dissolution and winding up of the company.[4] After providing for the general course of proceeding upon winding up, and the mode of ascertaining and getting in the estate, and also for making out a list of all debts and demands due, or which may be claimed from the company,

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[1] *Ex parte* Spackman, in re Agricultural Cattle Insur. Comp. 1 H. & T. 229.

[2] *Ex parte* Fisher, De Gex & S. 116.

[3] *Ex parte* Dee, ditto, 112.

[4] 12 & 13 Vic. c. 108, § 1.

the acts establish rules for the formation of a list of the members and the contributories of such companies. Every person, who in any event may become liable, is included in the list; and although a party may not actually have had his name inserted in the register of the company as a shareholder, yet if he has so acted, and his acts have been so far adopted, that it may be inferred that both parties have wavered in the observance of the unnecessary form, he will be held to be a contributory, but his liability will be limited to the time when his legal right to be registered accrued.[1] A holder of scrip-certificates,[2] and the provisional committee-man, are both held contributories;[3] and also the assignees of a bankrupt are contributories in their character of assignees.[4] The contributories are liable for expenses properly incurred by the directors, but not for such losses or expenses improperly incurred by them.[5] The list of contributories made out by the official manager, and settled by the master, is to be entered by the official manager in a book, which shall be from time to time inspected by the master, and certified by him in writing. A notice is given to every person in or excluded from the list, and, when such list of contributories is settled, it is held as conclusive, unless cause is shown to the contrary; and no person is entitled to appear as contributory, unless his name is on the list.

235. The money and assets of the company are, with all convenient speed, to be paid and applied by the official manager, under the direction of the master, towards the satisfaction of the debts of the company. The master has also power to make calls, and to apportion the same among the several contributories of the company as they appear

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[1] *Ex parte* Hall, re the North of England Joint-Stock Banking Comp. 5 Railw. Cases, 624.

[2] Re Rugby Warwick and Worcester Railw. Comp. 5 ditto, 611.

[3] In re Chester and Birkenhead Railw. Comp. Railway Cases, 26 April, 1850, V. C.

[4] Kuper's Case, De Gex & S. 113.

[5] In re Universal Salvage Comp. *ex parte* the Earl of Mansfield, 1 H. & T. 593.

from time to time on the list, giving notice of his intention to make calls by advertisement, in two successive numbers, in the London Gazette.[1] The winding up acts are extended to Ireland,[2] but they do not apply to Scotland. All companies are there liable to sequestration, and on the application of all or any of the partners, the Court of Session will appoint a judicial factor, with power to wind up the affairs of the company, and to sue in the name of the company.

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[1] 12 & 13 Vic. c. 45, §§ 82—85.

[2] 8 & 9 Vic. c. 98.

CHAPTER IV.

OF BANKS AND BANKING COMPANIES.

Section I.—HISTORY OF BANKING.

236. Banking is of ancient origin. The number and variety of coins introduced into different countries, and the difficulty of using other than the current coins for the purchase of commodities, suggested the traffic of money-changing. Reference to Scripture indicates that money-changers frequented the Temple of Jerusalem; the great festivals held by the Jews attracted many strangers, and money-changers occupied the outer courts of the Temple, to exchange the coins in possession of such strangers for the money current in Jerusalem. In Greece, money-changers acquired at an early period the character of bankers; and in the general insecurity of property, the priesthood allowed Delphi, their temple, to be a place of deposit for gold, which, by degrees, became a bank. At Rome, the revenues of the state and of private individuals were deposited with bankers (argentarii); but such business, like all kinds of trading, was held in general disrepute. Banks were first established in Italy as early as A.D. 808. The word *bank* is derived from the Italian Banco; a bench being erected in the market-place for the exchange of money. In the middle ages, the first public bank was erected in Venice, in 1153. With the progress of commerce in the twelfth century, Florence became the centre of the monetary transactions of all countries, and the business of banking considerably

enlarged. Public banks were afterwards formed in Barcelona, and established by the wealthy cloth-merchants, in 1401; in Genoa, in 1407; in Amsterdam, in 1607; in Hamburg, in 1619; in Rotterdam, in 1635; in Stockholm, in 1688; in England, in 1694; in Scotland, in 1695; in Copenhagen, in 1736; in Berlin, in 1765; the Casse d'Escompte in France, 1776; the Bank of Ireland, in 1783; of St. Petersburg, in 1786; in the East Indies, in 1787; in the United States of America, in 1791; and the Bank of France, established in 1803.

Section II.—THE BANK OF ENGLAND.

237. In England, the traffic in money was, as early as the thirteenth century, carried on by the Jews and by the Italian merchants, under the name of Lombards. Gold was, for a considerable time, deposited at the public Mint, in the Tower of London; until, in 1640, owing to the interference of the crown, in appropriating the money thus lodged, public confidence began to cease in the existing system. Upon the Civil War and the death of Charles I., the business of banking fell into the hands of the goldsmiths, who continued to deal as the acknowledged bankers of the country till 1694, when the Bank of England was established. This institution, which owes its origin to the need felt by Government of obtaining funds to carry on a foreign war, was projected by a Scotch merchant, Mr. Patterson. The capital to be advanced for the public service consisted of 1,200,000*l.*; and the subscribers were incorporated, by charter of William III., dated 27th July, 1694, into a society styled the Governor and Company of the Bank of England, who were to receive eight per cent. interest per annum, and 4,000*l.* for the expenses of management. This charter provided "that the management and government of the corporation be committed to a Governor, Deputy-governors, and twenty-four Directors, who shall be elected, between the 25th of March and the 25th April every year,

from among the members of the company; that those officers must be natural-born subjects of England, or have been naturalized; that they shall possess in their own names, and for their own use severally, the governor (at least) 4,000*l.*, the deputy-governor 3,000*l.*, and each director 2,000*l.* of the capital stock of the said corporation; that thirteen or more of the said governors and directors (of whom the governor or deputy-governor shall be always one) shall constitute a court of directors for the management of the affairs of the company; that no dividend shall at any time be made by the said governor and company, save only out of the interest, profit, or produce arising out of the said capital stock or fund, or by such dealing allowed by act of parliament."

238. Every elector must have, in his own name and for his own use, 500*l.* or more capital stock, and can only give one vote. He must, if required by any member present, take the oath of stock; or the declaration of stock in case he be a member of the Society of Friends. Four general courts are to be held in every year, in the months of September, December, April and July. A general court may be summoned at any time, upon the requisition of nine proprietors duly qualified as electors. The majority of electors in general courts to have the power to make and constitute bye-laws and ordinances for the government of the corporation; provided that such bye-laws and ordinances be not repugnant to the laws of the kingdom, and be confirmed and approved according to the statutes in such case made and provided. The bank was prohibited from dealing in any goods, wares, or merchandise, except bullion, and from purchasing any lands or revenues belonging to the crown, or advancing on the lands of the crown any sum of money by way of loan or anticipation.[1]

239. In the year 1708 an act was passed, declaring that during the continuance of that corporation it should not be lawful for any body politic other than the Governor and

[1] W. & M. c. 20.

Company of the Bank of England, or for any other company whatever in partnership, exceeding the number of six persons in England, to borrow or take up any sums of money on their bills or notes payable on demand, or in any less time than six months from the borrowing thereof. This restriction was confined to the forbidding only of banks of issue; but it having been construed to prohibit the formation of banks of all descriptions, the act was partially repealed in 1826, and, on the renewal of the charter in 1833, a clause was introduced expressly authorizing the establishment of banks which did not issue notes, with any number of partners, in any place within or without the limits to which the exclusive privilege of the Bank of England, in regard to issuing notes, now applied.

240. The charter of the Bank was renewed successively in 1707, 1708, 1713, 1742, 1764, 1781, 1800, 1833, and 1844. The original capital of the bank, which amounted to 1,200,000*l.* was enlarged in 1708, by new subscriptions, to 5,559,995*l.* and, in 1764, to 9,800,000*l.* In 1816, 25 per cent. of the profits were added to the amount of the stock, raising it to 14,553,000*l.*, the present prospectus capital. The Bank Charter Act of 1844 effected considerable alterations in the Bank, by dividing into separate establishments the banking and issue departments, limiting the amount of securities upon which the Bank may issue notes, and providing that a weekly publication should be made by the Bank of England of the state both of the circulation and of the banking department. Securities to the amount of 14,000,000*l.* were to be appropriated to the issue department: of this the debt due by Government, 11,105,000*l.* formed a part. And, in addition to the securities, any amount of gold and silver coin in the possession of the Bank, and not required in the banking department, was also to be placed in the issue department: and thereupon an equal amount in notes, including those in circulation, might be issued into the banking department.[1]

[1] The principle of this act, introduced by Sir R. Peel, was at the time of its introduction, and has ever since been, the subject of anxious discussion, whilst

241. The act also provided for arrangements which may be made by the Bank of England with any bankers who may dis-

its expediency has been strongly controverted. As the time approaches for the expiration of the Bank Charter, when the whole question will be reopened, in 1855, it may be desirable to set forth perspicuously the leading features of the views held by the supporters and opponents of the measure. An able paper was delivered on the subject before the Statistical Society * of London by Mr. Danson, wherein these views were stated in the form of propositions, gathered, on the one hand, from the evidence of Mr. Jones Lloyd, now Lord Overstone, and Colonel Torrens, and the speeches of Sir R. Peel, in favour of the measure; and, on the other, from the writings of Mr. Tooke and Mr. Fullarton against it. It was held by the supporters of the Bank Act:—

1. That the amount of the circulating medium in the hands of the public may be greater or less than is properly required for the transaction of the current business of the community; and that, when greater, it tends, by the excess, to make the use of the circulating medium too cheap.

2. That as the value of all other commodities is measured by that of the circulating medium, prices, or the nominal expressions of their value, are at such periods enhanced.

3. That such enhancements, by reducing exports and stimulating imports, turn the foreign exchanges against us, and lead to a drain of bullion.

4. That if, on the other hand, the amount of the circulating medium be reduced below that properly required for the time, a contrary effect will ensue, producing favourable exchanges and an influx of bullion.

5. That one principal cause, and that which has heretofore been the most common in this country, of an undue expansion of the circulating medium, is the putting or keeping in circulation, by their issuers, of too large an amount of bank-notes payable on demand.

6. That the issuers of such notes can regulate at will the amount of them in circulation; and,

7. That if the bank-notes in circulation be kept in strict proportion to the bullion in the hands of their issuers, the amount of the circulating medium will be prevented from becoming greater than it should be, and the mischief held to arise from its becoming so will be averted.

The counter propositions of those who hold that the act of 1844 is not founded upon correct views of the currency may be stated as follows:—

1. That no greater amount of the circulating medium, whether in coin or notes, is ever in actual use, or therefore in circulation, than is required by the current transactions of the community; for that so much of it as there is no present use for, goes either into hoards or into bankers' deposits. That if hoarded, it ceases to have any effect as circulating medium; and that if deposited with bankers, it can only pass again into use *at interest*, which interest will only be paid by those who have a profitable use for it.

* Journal of the Statistical Society, vol. x. p. 132.

continue to issue their own notes, and for increasing the amount of securities to the extent of two-thirds of the issue thus withdrawn. The Bank has the exclusive privilege in the city of London, or within three miles thereof, to issue, on *unstamped* paper, promissory notes for any sum of money amounting to 5*l.* or upwards, payable to the bearer on demand.[1] And during the continuance of the corporation, no company, exceeding six persons, can issue in London, or within sixty-five miles thereof, any bills of exchange or promissory notes payable on demand.[2]

242. The Bank may reissue any of their notes, after pay-

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2. That while a large portion of the circulating medium is dependent solely upon the credit of its issuers, its extension can, in fact, only be limited by the state of that credit on the one hand, and by the aggregate demand of those who are willing to pay for its use, on the other.

3. That while there is a large fund of deposits in every part of the country payable on demand, an issuing banker cannot affect the aggregate amount of the circulating medium, by issuing or withdrawing his notes.

4. That the amount of bank-notes in circulation, representing only one portion of the addition made by the operations of bankers to the amount of the circulating medium, through the agency of their credit with the public; a restriction upon the amount of the addition so made must be ineffectual, unless it be accompanied by a like restriction on such of their other operations as have the same, or a similar effect; and that, therefore, the omission of any regard to deposits, and their effect in supplying, readily and extensively, the place of a portion of the circulating medium of this country, must render the restriction now placed upon the bank-notes in circulation ineffectual to limit the amount of the circulating medium, whenever it shall become practically inconvenient either to bankers or to the public.

5. That the true measure of the voluntary addition made by a banker to the amount of the circulating medium is found, *not* in the amount of his notes in circulation, but in the terms upon which he makes advances; or, in other words, upon the price he charges for the use of so much of the circulating medium as he happens to command, either by the actual possession of money, or by his credit; and,

6. That any attempt to control the issuing banker by law, in the management of this branch of his business, would be, in fact, an attempt to fix the price of the use of money, or of credit held sufficient to represent money; which, like all other prices, is, and must continue to be, governed by influences wholly beyond the control of the legislature.

[1] 9 Geo. IV. c. 23, § 1.

[2] 3 & 4 Will. IV. c. 98, § 6.

ment thereof, as often as they think fit.[1] Bank of England notes, payable to bearer on demand, are a legal tender, except at the Bank or any of the branch banks of the company, where they are payable in gold on demand.[2] All notes of the Bank of England payable on demand, issued out of London, are payable at the place where they are issued.[3] At first the Bank issued no notes below 20*l.* In 1759 it began to issue notes for 10*l.*; in 1793, notes of 5*l.* were first issued; and in March, 1797, 1*l.* and 2*l.* were also sent in circulation. The issue of the latter ceased, generally, in 1821, though again put into circulation in 1825, for a short period during the commercial crisis. In 1829, however, it was enacted that no notes were to be issued below 5*l.* The Bank of England is the banker of Government, and has the management of the National Debt; it receives and registers transfer of stock from one public creditor to another; makes the quarterly payment of the dividends; circulates exchequer bills; and makes advances to Government, on the produce of the taxes not yet received, and on the security of exchequer bills. The Bank receives an allowance for the management of the public debt, of 340*l.* per million on 600,000,000*l.* of the public debt, and 300*l.* per million on all that it exceeds that sum. In consideration, however, of the exclusive exemption from the payment of stamp duties upon their notes, and of the privilege of exclusive banking, the Bank allows the annual sum of 180,000*l.* The balances of money belonging to the State are kept in the Bank. The Bank of England has branches at Birmingham, Bristol, Gloucester, Hull, Leeds, Leicester, Manchester, Newcastle, Norwich, Plymouth, Portsmouth, and Swansea.

Section III.—THE BANKS OF SCOTLAND, IRELAND, AND FRANCE.

243. The Bank of Scotland was established by act of parliament in 1695, by the name of "The Governor and Com-

[1] 55 Geo. III. c. 124, § 20. [2] 3 & 4 Wm. IV. c. 98, § 6. [3] Ibid. § 4.

pany of the Bank of Scotland," with a capital of 100,000*l.* The company had the exclusive privilege of banking in Scotland for twenty-one years; were exempted from public burdens; and the liability of the shareholders was limited to the amount of their shares. The capital was subsequently increased to 1,500,000*l.*, of which 1,000,000*l.* has been paid in. The Bank was forbidden to undertake any other business besides banking. The management rests in a governor, deputy-governor, twelve ordinary and twelve extraordinary directors, chosen every year by the stockholders possessing 250*l.* stock or upwards. Bank-notes of 1*l.* are in common use in Scotland, and Bank of England notes are not legal tender in Scotland;[1] as Bank of Scotland or Bank of Ireland notes would not be legal tender in England.

244. The Bank of Ireland was established in 1782, and obtained a charter in 1783. The original capital was 600,000*l.*, but was augmented, in 1821, to 3,000,000*l.* The Bank possesses the same privileges, and is governed by the same principles, as the Bank of England. In Ireland, 1*l.* notes are issued, but all notes for a fractional part of 1*l.* are prohibited.

245. The Bank of France has the exclusive privilege of issuing notes. The Bank has, at present, a capital of 91,250,000 francs, or 3,650,000*l.* The maximum circulation of the Bank is 452,000,000 francs, or 18,000,000*l.* The Bank of France can issue no notes below 100 francs. (4*l.*)

Section IV.—BANKING COMPANIES.

246. Banks in England, of six or less than six persons, established prior to the 6th May, 1844, having duly obtained a licence, may issue, on unstamped paper, promissory notes for five pounds or upwards, payable to bearer on demand, or to order, at any period not exceeding seven days after sight; and also draw and issue on unstamped paper bills of exchange, payable to order on demand, or any period not exceeding

[1] 21 & 22 Geo. III. c. 16.

seven days after sight, or twenty-one days after date; provided such bills be drawn on a bank in London, Westminster, or Southwark, or be drawn by a banker or bankers at a town where he or they shall be duly licensed to issue unstamped notes and bills upon himself or themselves, or his or their co-partners, payable at any other town where such banker or bankers shall be duly licensed to issue notes and bills.[1]

247. Partnerships of more than six persons, formed prior to the 6th May, 1844, may carry on business as bankers in England, sixty-five miles from London; and, subject to the regulation of the Bankers' Act, may issue their bills or notes at any place in England, exceeding such a distance from London, payable on demand or otherwise, and borrow money on their bills so made; but such partnerships must not have a house in London, or at any place not exceeding the distance of sixty-five miles from London.[2]

248. The power of banking companies to issue promissory notes payable on demand was restricted by the Banking Act, in 1844.[3] From the 6th May, 1844, no new bank could be formed in any part of the United Kingdom, as a bank of issue; and no company consisting of only six or less than six persons, was allowed to issue bank-notes, at any time whenever the number of partners therein should exceed six in the whole. If any banker, enabled to issue notes, become bankrupt, or cease to carry on the business of banking, or discontinue his issue of notes, he cannot resume it at any time thereafter. The existing banks of issue which claimed, after the act came in force, to continue to issue their own notes, were to declare the average amount of the notes which they had put in circulation during the twelve weeks preceding. The maximum of the notes in circulation of each bank of issue in England, is the average of the notes issued during the four weeks ending the 27th April, 1844. When two or more banks become united, the commissioners may ascertain the

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[1] 9 Geo. IV. c. 23. [2] 3 & 4 Wm. IV. c. 98. Ibid. c. 83, § 2.
[3] 7 & 8 Vict. c. 32.

average amount of the notes of each bank; and the amount of the two so united may be issued by the united bank, provided, however, the number of partners continue six, or less than six. Every banker must take out a separate and distinct licence for every town or place at which he intends to issue any notes (a duty first enjoined upon bankers in 1809); but those bankers who had four licences, in force on the 6th May, 1844, were not required to take out more than that number of licences.

249. In Scotland, the issue of bank-notes is regulated by a statute passed in 1845.[1] The power of issuing notes is, by that act, confined to those banks which issued notes in the year preceding the 1st May, 1845; and the amount of issue is the average amount of notes which each bank had in circulation during that year, and the amount of gold and silver which might be in the hands of the banker—the silver, however, not exceeding one-fourth the amount of gold. In Ireland, the issue of notes is based on the same system as in England.[2] The amount of issue is the average amount of the year ending 1st May, 1845.

250. The following points of difference exist in the banking systems of England, Ireland, and Scotland:—[3]

(1.) The maximum of the circulation in England is the average of the twelve weeks ending the 27th April, 1844. The maximum in Scotland and Ireland is the average of the year ending the 1st May, 1845.

(2.) The English banks are not, under any circumstances, allowed to exceed their fixed limit. The Scotch and Irish banks are allowed to exceed their limit, provided they hold in their coffers, at the head office, an amount of gold and silver equal to such excess.

(3.) In England, should two joint-stock banks of issue effect a junction, the circulation of one of them would be for-

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[1] 8 & 9 Vict. c. 38. [2] Ibid. c. 37.

[3] These differences are detailed in Gilbart's Practical Treatise on Banking, vol. ii. p. 608.

feited, and the united bank could issue only to the amount of the two circulations added together.

(4.) In Scotland and Ireland, notes under 5*l.* are still permitted. In England, notes under 5*l.* are prohibited.

(5.) If any bank give up its issue, and agree to issue Bank of England notes, the Bank of Ireland may increase her authorized issue to the full amount of the issue of the bank whose notes are withdrawn. In England, the Bank of England can, in a similar case, issue only to the extent of two-thirds of the issue of the bank whose notes are withdrawn.

(6.) In England and Ireland, all the notes are legally demandable in gold at the branches where they have been issued. In Scotland, they are payable only at the head office of the bank that issues them.

(7.) The Scotch banks are all joint-stock banks. In England and Ireland, there is a mixture of joint-stock and private banks.

(8.) The Scotch banks are all banks of issue. In England there are many, both private and joint-stock banks, that are not banks of issue.

(9.) The Scotch banks generally have branches. In England and Ireland most of the private banks, and some of the joint-stock banks, have no branches.

(10.) The Scotch banks universally grant interest on the balance of current accounts; a practice not universally adopted in England, especially in London.

(11.) The mode of making advances, by way of cash credit, is general in Scotland, but very rare in England.

Section V.—JOINT-STOCK BANKING COMPANIES.

251. Joint-stock companies for the purpose of banking are now regulated by special statute, which rendered it unlawful, after the 6th May, 1844, for any new company to be formed of more than six persons to carry on the business of banking in England, under any agreement, unless by virtue

of letters patent;[1] not, however, restraining companies established before such date from carrying on business without such letters patent. Before beginning to enter into any business, the company must obtain such patent, by petitioning her Majesty in council, setting forth the names of all the partners of the company, the proposed name of the bank, the name of the place where the bank is to be carried on, the proposed amount of the capital stock, which must not be in any case less than 100,000*l.*, and the means by which it is to be raised; the amount of the capital stock then paid up, and where and how invested; and the proposed number of shares in the business, each share being not less than 100*l.*[2] The company cannot commence business till the deed of partnership shall have been executed, all the shares subscribed for, and at least half the amount of each share paid up.[3]

252. Her Majesty is empowered to grant that the company shall be incorporated, for the purpose of carrying on the banking business, by such name as shall be given to them by the letters patent, and shall have perpetual succession and a common seal, and shall have power to purchase and hold lands: the charter to be granted for a term not exceeding twenty years.[4] But, notwithstanding such incorporation, the shareholders do not acquire any privilege of limitation of liability for the contracts and undertakings of the company; and every judgment against the company may be executed against the property and effects of the company, and upon the person, property, and effects of every shareholder.[6] The regulations respecting the execution against former shareholders, their reimbursement, and the contribution to be recovered from the other shareholders, are the same as already expounded with respect to joint-stock companies in general. Within three months after the grant of the patent, and before the company begin to carry on the business of bankers, they must make a memorial, setting forth the title or firm of the company,

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[1] 7 & 8 Vic. c. 113, § 1. [2] Ibid. § 2. [3] Ibid. § 5.
[4] Ibid. § 6. [5] Ibid. § 7. [6] Ibid. § 9.

and other particulars; the same memorial to be made by the company in every year between the 20th February and 25th March; such memorial to be delivered at the stamp-office in London, and to be there registered in a book kept for the purpose, which shall be opened for inspection to any person upon the payment of one shilling: the company causing, moreover, to be printed, and kept in a conspicuous place in their office, a list of the names and abodes of all the shareholders.[1] A similar account must be made of all the changes that may take place in the body of shareholders.[2]

253. All bills of exchange are to be signed by one of the managers or directors of the company, and by him expressly to be so signed on behalf of the company. But the manager or director shall not become liable on such bill to any greater extent than upon any other contract signed by him on behalf of the company. The transfer of shares is regulated by rules similar to those established by the Joint-Stock Companies Act. Where shares on banking companies are transmitted by other means than by transfer: as, in consequence of the death, or bankruptcy, or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or any other legal means; the transmission must be proved by declaration in writing, duly authenticated.[3] Where any shareholder is a minor, idiot, or lunatic, the receipt of the guardian for the minor, or the receipt of the custodians of such idiot, for any payment due to them, shall be a sufficient discharge. The company is not bound to watch over the execution of any trust to which any of the shares may be subject; the receipt of the party in whose name such shares shall stand in the books of the company, shall from time to time be sufficient discharge to the company for any dividend or other sum payable in respect to such share.

254. The directors may make such calls of money upon the respective shareholders, in respect of the amount of capital stock subscribed by them, as they shall think fit; and if any

[1] 7 & 8 Vict. c. 113, § 16. [2] Ibid. § 17. [3] Ibid. § 26.

shareholder do not pay the amount of any call, he shall be liable to pay interest at the rate of five per cent.; and if he failed to pay the amount of such call, the company may sue such shareholder in any court of law or equity.[1] If the holder of any share fail to pay any call of money, the directors, at any time after the expiration of six months, may declare such share forfeited; but the forfeiture of the share shall not relieve the shareholder of his liability to pay the calls made before such forfeiture.[2] The company cannot sell more of the shares of such defaulter than will be sufficient to pay the arrears then due from the defaulter, together with interest and expenses attending the declaration of forfeiture and sale;[3] and if payment of such arrears of calls, interest, and expenses, be made before any share so forfeited shall have been sold, such share shall revert to the original holder.[4] The dissolution of joint-stock banking companies is governed by the Winding up Act.[5] The Joint-Stock Bank Act was extended to Scotland and Ireland.[6]

Section VI.—Relations of Bankers and their Customers.

255. A banker has been defined to be a person receiving money on deposit, and paying it out again to order, and

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[1] 7 & 8 Vict. c. 113, §§ 31—33. [2] Ibid. § 37. [3] Ibid. § 41.
[4] Ibid. § 42. [5] 9 & 10 Vict. c. 75.
[6] An Act has just passed, 17 & 18 Vict. c. 73, for the purpose of amending the Joint-Stock Bank Act, in so far as the same applies to Scotland. It was thereby provided that the right of retention, or lien, which, in virtue of the common law of Scotland, the company has over the shares of the partners, in respect of any debt or liability incurred, or obligation undertaken by them to the company, shall not be affected by any clause inserted in the deed of partnership; that as often as the company may, in virtue of their right of lien, acquire any shares in the company's stock, they shall be bound to sell them within six months, and account to the parties interested in such shares for the balance of the price realized, after paying the debt due to the company, and the expenses incurred by them in securing the debt and selling the shares: provisions to be made in the deed of partnership, regulating the manner in which bills of exchange of the company may be made, accepted, or endorsed, it being not necessary that such bills or notes be signed in the manner represented by the Joint-Stock Bank Act.

discounting bills. This, however, must be the substantial part of his trade. It does not depend upon the fact whether a person has or has not occasionally done acts which a banker regularly and openly would have done; nor upon what he may have done upon one day, and what upon another day; but it must be his habitual business.[1] Therefore, unless he held himself out to the public as a banker, and the public has taken him to be one, he would not come within the scope of the Bankers' Acts.[2]

256. A banker does not stand in the character of agent or trustee towards his customers. The relation between a banker and a customer who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts. Therefore, the money deposited by customers with their bankers is intrusted, not as a deposit, but on pure credit, as a loan; it is money which the banker may deal with as his own, notwithstanding he is bound to return it on demand. So a banker who receives endorsed bills[3] from his customers, to be got in when due, and carried to his account, may discount and sell them, and may also pledge them with another; in fact, he acquires a complete dispensing power over the money and effects put in his hands.[4] Doubtless, this absolute property may be qualified by circumstances, such as where bills are remitted for a particular purpose, or to be dealt with in a particular manner, and to be received and entered as cash when due. In such case, the customer will preserve a right over the bills, and the banker is then to be considered as the factor of the customer; but generally, although in common parlance a person says that he has so much money in the hands of his bankers, the customer is, in fact, no more than a mere creditor of the banker.[5]

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[1] Stafford *v.* Henry, 12 Irish Eq. Rep. 400. [2] 8 Geo. I. c. 14.

[3] Laing *v.* Smyth, 7 Bing. 284.

[4] Collins *v.* Martin, 1 B. & P. 648. Thompson *v.* Giles, 3 D. & R. 745.

[5] Bosanquet *v.* Dudman, 1 Stark, 1. Watts *v.* Christie, 11 Beav. 552.

257. A banker would have a right to negotiate bills deposited by his customer, even without express authority, in order to meet bills or cheques drawn by the latter on the banker; and where the banker has accepted bills to a much larger amount than the cash balance in his hands, or has discounted bills for his customer, he may hold any collateral securities for value. Bankers have a general lien upon all notes, bills, and other securities in their hands, for their general balance,[1] unless it be proved that the securities were handed under special circumstances or agreement.[2]

258. An implied duty undertaken by the banker, in receiving sums of money belonging to his customer, is to pay any cheque drawn by him, after the lapse of such reasonable time as would afford an opportunity to the different persons in the establishment of knowing the fact of the receipt of such money; and a refusal to pay a cheque under such circumstances is a breach of duty, for which the customer would be entitled to damages of an amount proportioned to the injury he may have suffered thereby;[3] and even where no actual damage was sustained, the customer may maintain an action of tort against the banker for refusing payment of his cheque, because it would be a tort on a banker to say falsely of his customer that he has no assets, so that he drew cheques without any assets, and the dishonour of his cheque amounts to this.[4] In case of bankruptcy of a banker, the bills endorsed to him become part of his assets, except such as were intrusted to, or deposited with him, for a determined purpose. Having become the property of the banker, the customer cannot follow such bills in the assignee's hands.[5]

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[1] Davis *v.* Bowsher, 5 T. R. 488. Giles *v.* Perkins, 9 East, 14. Branda *v.* Barnett, 12 Cl. & Fin. 808.

[2] Jourdaine *v.* Lefevre, 1 Esp. 66. Scott *v.* Franklin, 15 East, 428 *Ex parte* Waring, 2 G. & J. 403.

[3] Marzetti *v.* Williams, 1 B. & Ad. 419. Rollin *v.* Steward, 2 Com. Law Rep. 959.

[4] Rollin *v.* Steward, 2 Com. Law Rep. 959.

[5] Rymer *v.* Laurie, 18 L. J. Q. B. 248.

REMARKS

ON

PARTNERSHIP EN COMMANDITE.

NATURE AND CONSTITUTION OF PARTNERSHIP WITH LIMITED LIABILITY, OR EN COMMANDITE.

259. Partnership *en commandite* is a contract of capital and labour. When, in the middle ages, Italian traders explored the Eastern ports, commandite was the contract entered into between the shipper and the person entrusted with the cargo. The shipper was the Accomendante, the person entrusted the Accomendatario, and the contract one of Accomenda. By this maritime contract, a quantity of goods was entrusted by one person to another to carry them beyond sea, on the shipper's account, upon condition of their participating together in the profits. It was partly a contract of mandate, partly one of partnership. The share of profit granted to the Accomendatario was a kind of salary for his trouble; yet the uncertainty of such profit took it out of a contract of agency. The Accomendante ventured the capital so exposed; the Accomendatario ran the risk of losing the reward of his labour. Such was the contract of Accomenda mentioned in the Consolato del Mare. A similar agreement was entered into for carrying on inland trade, by means of persons going to fairs; and it was introduced into the laws of the Crusaders, the laws of Montpellier, the statutes of Ancona, Marseilles, Genoa, Barcelona, Pisa, and Florence. Yet the contract admitted of further extension. Instead of trusting a capital in merchant

dise, it was found more convenient to trust a sum of money. At a time when ecclesiastical anathemas were pronounced against usury, and when commerce itself was deemed a degrading vocation, a system which offered such favourable prospects for the investment of money, with a risk not exceeding the sum embarked in the operation, whilst it sheltered the speculator from the danger and contumelies attached to the mercantile profession, could not fail to become attractive, and it was thus gradually incorporated into the system of trade. The ordinance of Colbert, of 1673, found the custom and legalized it; thence it was introduced into the French code of commerce, and into the codes of other Continental States; and progressively into the United States of America.

260. In order to form a correct idea of the nature of the contract, we shall examine the provisions of the American statutes, and notice the principal points of difference between them and the laws of France and other countries on the subject. A partnership *en commandite* consists of one or more persons, called general partners, who are jointly and severally responsible as general partners now are by law, and one or more persons who contribute in actual cash payments a specific sum as capital to the common stock, who are called special partners or *commanditaires*, and who are not liable for the debts of the partnership beyond the fund so contributed by him or them to the capital. The general partners only are authorized to transact business and sign for the partnership, and to bind the same. The special partners cannot take any part in the administration of the affairs of the partnership; and any interference on their part will render them liable to the full extent of their property, toward the general partners and third persons, for all the debts of the partnership. They may, however, from time to time examine the state and progress of the accounts, and may advise as to the management of the concern; but they cannot transact any business on account of the partnership, nor be employed for that purpose even as agent, attorney, or otherwise. A committee of inspection is often formed in large partnerships *en commandite*, to watch

over the affairs of the house on behalf of the body of *commanditaires*.

261. The contract of partnership must be formed by deed, containing, 1st, the name or firm under which such partnership is to be conducted. 2d. The general nature of the business intended to be transacted. 3d. The names of all the general and special partners interested therein, distinguishing those who are general and those who are special partners, and their respective places of residence. 4th. The amount of capital which each special partner is to contribute to the common stock; and 5th, the period at which the partnership is to terminate. Such deed must be signed by the parties before the judge, and is filed in the office of the clerk of the county in which the principal place of business of the partnership is situated, and is also recorded by him in a book kept for the purpose, open to public inspection. In France, an extract of such deed must be deposited at the registry of the Tribunals of Commerce; but it is not essential that it should contain the names of the shareholders or *commanditaires*, and in practice such names are scarcely ever published. If the partnership has houses of business situated in different counties, a transcript of the certificate, and of the acknowledgment thereof, is likewise recorded in the office of the clerk of every such county. The same must be advertised in two newspapers for at least six weeks immediately after such registry, and in such journal as the court may prescribe. The American law renders it imperative for special partners to bring their respective contributions in actual cash payment as capital. The Irish statute required each special partner to pay not less than one-fourth of the sum subscribed at the time of executing the articles, and the remaining three-fourths within twelve months. No such provisions exist in the French and Continental law on the subject.

262. No part of the sum which any special partner has contributed to the capital stock can be withdrawn, nor any division of interest or profits be made, so as to reduce such capital stock below the original sum. By the Irish law, each partner may

only take out annually half of his share of the profits, the other half to go towards the increase of the joint stock until the expiration of the partnership. The French law is silent as to the ultimate liability of the profits withdrawn for the debts of the concern; and the state of jurisprudence on this point is extremely ambiguous and conflicting. The statutes of the several States of America differ also materially on the subject. According to the statutes of Maine, Massachusetts, Vermont, Rhode Island, Michigan, and Indiana, if at any time during the continuance, or at the termination of the partnership, the property or the assets should not be sufficient to pay the partnership debts, then the special partners would severally be held responsible for all the sums by them in any way received, withdrawn, or divided, with interest thereon from the time when they were so withdrawn respectively. By the statute of New York it is provided, that if it shall appear that, by the payment of interest or profit to any special partner, the original capital has been reduced, he shall refund sufficient to make good his share. If, therefore, the commandite partners have divided honestly and legitimately a certain per centage of profits, say ten per cent. per annum, for a series of years, leaving intact the whole capital; should the partnership at any future time suffer a complete reverse, the special partners would not be bound to return the profits, and they would only lose the original capital contributed. Again, the statutes of Maryland and Connecticut prohibit any payment or share of interest and profit during the continuance of the partnership.

263. The affairs of the partnerships are carried on in the name of a firm, in which the names of the general partners only are inserted, without the addition of the word *company*, or any other general term; and if the name of any special partner is used in such firm with his consent, he would be deemed as a general partner. In France, two kinds of commandite partnership prevail; one of *simple* commandite, composed of one or more general partners, and one or more commanditaires. The capital contributed is not divided by shares.

The name of the firm must include that of the general partner. Another is the general commandite by shares, based on the same principle, the shares of which have, by the French jurisprudence, been held to be transferable. The property in such shares is established by the registers of the partnership, signed by the endorser, or his attorney.

264. Every renewal or continuance of such partnership beyond the time originally fixed for its duration, must be certified, acknowledged, and recorded, and notice be given in the same manner as is required for the original formation; and every such partnership, otherwise renewed or continued, is deemed to become a general partnership. No general assignment by such partnership, in case of insolvency, is valid, unless it should provide for a distribution of the partnership property among the creditors. In case of insolvency or bankruptcy of the partnership, no special partner can be allowed to claim as a creditor until the claims of all the other creditors of the partnership are satisfied. No dissolution of such partnership by the acts of the parties can take place, previous to the time specified in the certificate of its formation or of its renewal, until a notice of such dissolution be filed and registered at the office of the tribunal where the original deed was recorded, and published once in each week, for four weeks, in a newspaper of the district, and in the Gazette. All suits respecting the business of such partnership are prosecuted by and against the general partners only, who alone are responsible towards third persons.

265. An examination of the law of partnership of the principal commercial countries, is sufficient to show that partnerships with limited liability enter largely into their mercantile system, and that they are sanctioned by the law and common consent of all nations, whilst the testimony of observation and of experience all but universally establish their beneficent tendency. Yet in Great Britain, the most enterprising and the most important commercial country in the world, the introduction of such partnerships has been resisted. Not, however, as a general rule: on the contrary, all the vast undertakings which

have contributed to her gigantic growth, were carried out by partnerships with limited liability. But, instead of acting on an impartial and uniform system, limited liability is, on the one hand, branded as a semi-fraudulent transaction, and on the other, it is held as a privilege granted by government. Such, in fact, is the arbitrary system adopted in fixing the extent of liability of companies, that it has become difficult to know whether an incorporated or chartered company is founded on limited or unlimited liability. It has well been stated, that there are at present the old chartered and parliamentary corporations, with absolutely limited liability; the chartered colonial banks, with liabilities to two or three times the amount of shares; completely registered companies, with unlimited liability; and new joint-stock banks, expressly required to be chartered, and expressly denied limited liability.[1] A system so anomalous in itself, and so incongruous with the ordinary principles of national legislation, could not fail to awaken public attention; and repeated inquiries were instituted by her Majesty's Government into the foreign systems of partnership, and especially into the nature and working of partnership *en commandite*, with the view of establishing fixed rules in the granting of powers to partners in public companies, to limit their liability.

266. As early as in 1837, a report on the subject was presented to the Board of Trade; but the authorities in favour of and against partnerships with limited liability were nearly balanced, and the introduction of the measure was not recommended. In 1844, the Committee of the House of Commons on Joint-stock companies received further evidence on the subject, although it was not within the scope of their inquiry. In 1850, a committee of the House of Commons was appointed to consider and suggest means of removing obstacles, and giving facilities to safe investments, for the savings of the middle and working classes. That committee recommended that charters

[1] See evidence of Mr. Ludlow, in the Report of the Royal Commissioners, p. 144.

should be granted with the greatest caution, but at a far more reasonable cost. In 1851 another committee was appointed by the same House, to consider the law of partnership, and the expediency of facilitating the limitation of liability, with a view to encourage useful enterprise, and the additional employment of labour. The recommendations of the committee were to the effect "that power be given to lend money for periods not less than twelve months, at a rate of interest varying with the rate of profits in the business in which such money may be employed, the claim for repayment of such loans being postponed to that of all other creditors; that in such case the lender should not be liable beyond the sum advanced; and that proper and adequate regulations be laid down to prevent fraud, and also a greater facility in granting charters, under rules published and enforced by the proper authorities." That committee recommended the appointment of a Commission to consider the whole Law of Partnership.

267. In 1852, a Royal Commission having been appointed to inquire into the state of the mercantile law of Great Britain and Ireland, the Commission reported as follows on the subject of Partnership:—

"In considering this subject, the question which appeared to Your Majesty's Commissioners of paramount importance was, whether the proposed alteration of the law would operate beneficially on the general trading interests of the country, and they arrived at the conclusion that it would not. They have not been able to discover any evidence of the want of a sufficient amount of capital for the requirements of trade; and the annually increasing wealth of the country, and the difficulty of finding profitable investments for it, seem to them sufficient guarantees that an adequate amount will always be devoted to any mercantile enterprise that holds out a reasonable prospect of gain, without any forced action upon capital to determine it in that direction; while any such forced action would have a great tendency to induce men to embark in speculative adventures, to an extent that would be dangerous to the interests of the general commerce of the country. Moreover, Your Majesty's Commissioners find no reason to suppose that the reputation of the British merchants, either at home or abroad, would be raised by the establishment of firms trading with limited liability, but the contrary; for many of the opinions in favour of such a system, are coupled with a recommendation of more stringent regulations than those now existing for the prevention of fraud. But if such partnerships would increase the danger of fraud, they can hardly be otherwise than prejudicial to our mercantile reputation. Your

Majesty's Commissioners have also considered the subject, with regard to the benefit which it may be calculated to confer on individuals, by enabling them to obtain capital, and establish themselves in business, by the aid of partners incurring limited liability only. It cannot be doubted that instances occur where men of probity and talent would derive benefit from such a system, but Your Majesty's Commissioners are of opinion that such benefit has been greatly overrated.

"Further, it appears to Your Majesty's Commissioners, that the benefit to be acquired by the managing or limited partners, will be at the expense of a more than countervailing amount of injury to traders bearing the burden of unlimited liability, who will have to enter into competition with those who enjoy the protection to be given by the proposed law.

"But while Your Majesty's Commissioners are of opinion that it is not expedient to alter the law, and allow all persons at their own election to trade with limited liability, they are aware that many useful enterprises calculated to produce benefit to the public, and profit to those who engage in them, are of such magnitude, that no private partnership can be expected to provide the funds necessary to carry them into effect, or to have the means of superintending and managing them, of which docks, railways, and extensive shipping companies may be taken as examples. And there are others of a more limited character from which benefit to the humbler classes of society may be expected to accrue, such as baths and washhouses, lodging-houses and reading-rooms, to the establishment of which, by large capitalists, there is little inducement. These two classes of undertakings it may therefore be desirable to encourage, by limiting the liability of those who embark in them. But, with regard to both, Your Majesty's Commissioners think they should be subjected to some previous inquiry as to the means of carrying them into effect, and the prospect of benefit to the promoters and the public. With regard to those undertakings, the execution of which involves an interference with the rights of property, the sanction of Parliament always has been, and still ought to be required. With regard to others, the privilege of having a limited liability may be granted by charter; and, for the purpose of regulating the granting of charters, Your Majesty's Commissioners recommend that a Board be established to decide upon all applications for them; and this Board should require, in all cases, compliance with certain fixed regulations.

"Much observation has been made upon the expense of obtaining charters or private Acts of Parliament. Where a charter is applied for, calculated to affect injuriously the interests of others, it seems contrary to natural justice to refuse them an opportunity of stating and proving the validity of their objections, but regulations should be made to keep the expenses of such inquiry as low as possible. Your Majesty's Commissioners feel that it is beyond their province to offer any suggestions respecting the expenses of obtaining private Acts of Parliament. If a charter is asked for the establishment of baths and washhouses, or other things of that nature, opposition is hardly to be anticipated, and the Board would have little to do, beyond seeing that their fixed rules have been complied with, and the expense ought to be very small.

"The attention of Your Majesty's Commissioners has been directed to another subject, which appears to them within the spirit, if not within the letter, of their commission, viz. the expediency of a further relaxation of the Usury Laws, and of enabling capitalists to lend money to traders at a rate of interest, and agents and servants to receive remuneration for their services by money payments, varying with the profits of the business, without being exposed to the hazard of being rendered liable, as partners, to the creditors of the concern.

"In *ex parte* Hamper, 17 Ves. page 403 (a case relating to the remuneration of an agent or servant), Lord Eldon appears to have considered that such contracts might exist without constituting a partnership; provided, of course, that they are made in good faith, and are not partnerships in disguise; and in Pott *v.* Eyton, 3 Common Bench Reports, page 32, Lord-Chief-Justice Tindal expressed an opinion, that it made no difference whether the money was received by way of interest on money lent, or wages, or salary as agent, or commission on sales. But it appears to Your Majesty's Commissioners, that in practice they would be attended with so many difficulties, and with so many results which the contracting parties would probably consider very objectionable, that Your Majesty's Commissioners do not expect they will ever be extensively made.

"In the report of the committee of the House of Commons on the Law of Partnership, dated 8th July, 1851, it was recommended 'that power be given to lend money for periods not less than twelve months, at a rate of interest varying with the rate of profits in the business in which such money may be employed, the claim for payment of such loans being postponed to that of all other creditors; that, in such case, the lender should not be liable beyond the sum advanced; and that proper and adequate regulations be laid down to prevent fraud.' As to the expediency of adopting that suggestion, Your Majesty's Commissioners, who concur in the residue of this Report, are not agreed in opinion.

"With regard to the Usury Laws, Your Majesty's Commissioners are of opinion that it would be expedient to repeal them altogether, as far as they affect personal securities, but offer no opinion with reference to real securities. In concluding their brief report, Your Majesty's Commissioners feel that although the details of our mercantile laws may require correction, yet there is on every side such abundance of satisfactory progress and national prosperity, that it would be unwise to interfere with principles, which in their judgment have proved beneficial to the general industry of the country."

268. When we speak of the *law of partnership*, it is not meant that certain kinds of partnerships are formed according to the requirements of the law, but that such agreements as are entered into between individuals to combine their capital or their industry, on conditions of fairness and good faith, are entitled to the protection of the law; or, in other words, that the law will afford the means to secure the performance

of the engagements accruing therefrom. It is erroneous to suppose that the law can hinder the formation of any kind of partnership, where it cannot be proved that it is founded on fraud; and in all cases, the burden lies on the part of the law to justify the ground of its prohibitive interposition. The distinct feature of partnership *en commandite* is the introduction of capital by special partners in a mercantile concern, on conditions differing from a pure loan mostly in the uncertainty of the profits in which the partners are entitled to participate. With respect to the managing partners, they stand in the same capacity as general partners in common partnerships; having an unlimited control, they have also unlimited liability. The special partners, however, invest an amount of capital in the business, to be responsible for the debts of the house, on condition that they shall participate in the profits and loss only in proportion to the capital contributed. As the special partners abstain from any interference in the general management of the concern, and are thereby precluded from influencing or deceiving third persons with regard to their interest in it, so they undertake no further liability than the sum they have embarked in the business.

269. The managing partners make it known that they assume the management of the business with the assistance of the capital so obtained; and third parties who grant them credit, will look to the character and capacity of the general partners, and to the capital they have at their disposal, as the basis of their trust. No fraud is contemplated in such a transaction. In so far as it regards the individuals among themselves, there is a full concurrence in the conditions of the partnership. With respect to creditors, it is always at their option whether, under all circumstances, a mercantile house so constituted is worthy of credit; and where they concede such a credit, with full knowledge of the conditions on which such partnership is formed, it is tantamount to their agreeing to the immunity of the special partners. The doctrine that credit is granted to the general partners only, is questioned by the supposition that all partners become

co-owners of the goods or funds so acquired on credit from third parties, and that therefore special partners, as well as the general partners, may be considered as co-purchasers of the goods or co-borrowers of the money. It must be remembered, however, that, although it is the firm which purchases goods and borrows money, and not the gerants or commanditaires, yet the firm of a partnership *en commandite* is held as a separate person, altogether distinct in its interests from the partners commanditaires. Moreover, the whole property, and the disposal of it, vest in the managing partners only, as the only persons whose names appear as the contracting parties; and it is only a lien that each commanditaire has on the original capital, and on the property acquired by the managing partners in their common behalf, as a security for the debts of the firm. It is objected that the participation and yearly withdrawal of the profits allow special partners to remove from the partnership fund that amount which constitutes the main foundation for the security of creditors. But, in the first place, even in common partnership, there may be a periodical withdrawal of the profits to the private account of each individual partner, which may be used for other purposes than that of the partnership; secondly, notwithstanding the special partners withdraw their proportions of the profits, the capital itself cannot be withdrawn or otherwise assigned or reduced, and that remains responsible for the continuing accounts.

270. The difference on this point will be, that whereas, in common partnerships, the accumulation of profits will add to the solvency of the firm, on the ground of the continued addition to the capital invested, or for which, although withdrawn from the business, the partners remain individually liable; in the case of commandite partnership, the solvency of the firm will increase in proportion only to the increased capital of the managing partners, and with the provident and skilful management of the concern, which will secure a corresponding success, and thereby attract increased support and confidence. The difference between a loan and a commandite

investment consists in this: in the former case, a sum of money may be intrusted to the partnership at an exorbitant interest, and whether the affair proves successful or not, both capital and interest may be withdrawn at any time; and, in the other, a special partner incurs the risk of receiving no interest whatever for the money, and cannot withdraw the capital invested until the whole of the partnership debts are extinguished. Again, in the case of a loan, should bankruptcy arise, the lender of money, after having regularly received his interest, will be entitled to claim as a creditor for the amount; whereas a special partner cannot claim in competition with creditors. Such being the conditions of partnerships with limited liability, it is difficult to conceive on what grounds of natural justice special partners may be made liable, as general partners, for partnership debts, notwithstanding their public and private agreements to the contrary. Natural justice demands that any person conducting or taking any part in the conduct of a business of any kind, whether as the director of a company, or managing partner, or borrower of money, should be liable to the full extent of his property for the debts which may be incurred in respect of such business; but it does not require that shareholders or lenders of money, on whatever terms, not taking part in such management, should be so liable beyond the amount of any share or loan which he may have contributed for the purpose of the business.[1]

271. If, therefore, the constitution of partnership with limited liability be not immoral in itself, and not opposed to the principles of justice, it is foreign to the purpose to inquire how far it is expedient to allow its introduction; because "there is no evidence of the want of a sufficient amount of capital for the requirements of trade."[2] Where it is not in

[1] See Lord Hobbard's Remarks on the Law of Partnership Liability.

[2] See "First Report of the Commission appointed to inquire and ascertain how far the Mercantile Laws, in the different portions of the United Kingdom of Great Britain and Ireland, may be advantageously assimilated; and, also, whether and what Alterations and Amendments should be made in the case of Partnership, as regards the question of limited or unlimited Responsibility of Partners." 1854.

the province of the law to exercise a prohibitory interference, such interference will act unjustly in all cases "where men of probity and talent would derive benefit from such a system;" and it is no reason why their just right should be opposed, to assert that "injury would thereby accrue to traders bearing the burden of unlimited liability." It is not those seeking the formation of partnerships with limited liability who require the protection of the law; but those indulging in illusory forebodings as to the possible effect of competition with such partnerships who assert the right to such protection.

272. Where it is not asserted that partnerships with limited liability are founded on fraud, apprehensions are suggested that they are exposed to numerous frauds. Moreover, it is feared lest third persons, ignorant of the terms of such partnerships, may be prompted to enter into transactions with them by the fact that persons of capital are connected with such houses. This system of granting credit is founded on erroneous grounds of confidence; and it is not in the province of the legislature to protect creditors from an unguarded mode of dealing. As all human affairs are subjected to abuses, it would be needless to prohibit, on account of possible frauds which may be practised, or of possible misunderstandings which might arise, the carrying out of otherwise fair and honest transactions. It is not in the *thing*, but in the *person*, that we must search for the causes of the recurrence of frauds; and most of the numerous checks suggested to be imposed, in the event of the introduction of partnerships with limited liability, are dictated by erroneous conceptions of the nature and operations of the law.

273. The question of limited liability in partnership should be considered in its different and distinct bearings on numerous relations, especially as these have hitherto been indiscriminately suggested in the various reports and evidences. A common application of the principle of commandite is that of retiring merchants disposing of their business in favour of some of their former clerks. The case is described by Mr. Horace Say, in his answers to the queries of the Mercantile Law Commis-

sion, as follows:—Two partners have made their fortune in business, and have a large stock; they wish to retire, but are willing still to participate, in some measure, in the profit of the custom they have been able to obtain. They therefore choose, from among their employed, two young men, whose capacity, honesty, and economic habits, they have valued for years, and constitute them the managing partners of the house which shall succeed them, whilst they themselves take the position of commanditaires. Suppose the business requires a million of capital; they provide it accordingly. Perhaps 100,000 francs are contributed by the managing partners, and 900,000 francs by the commandite partners. Of course, the share of profits participated in by the managing partners would be larger than they would have been entitled to in proportion to the capital they have contributed, but that is conceded as a reward for their care and labour. The retiring merchant is thus able to leave a certain sum in trade, for the benefit of the most able and faithful amongst his employed, at the same time that his continued inspection is a guarantee to the success of the business. At present, in this country, if the retiring partner leaves the smallest sum in the concern otherwise than at interest, or at a fixed annuity, he continues responsible for the debts of the firm on the whole of his property.

274. Another class of cases is that of a person possessing a special capacity for some kind of industry, who is in want of capital to develop it. He offers to put in partnership his time, labour, and little savings; some rich capitalists unite together, and give him a sufficient commandite, and thus he is enabled to pursue any great undertaking. In cases of this description it would be very different were the individual to obtain the money by loan. Let it be found, for instance, that the business is not successful, and three-fourths of the capital was lost, he would, in the character of commanditary, have sacrificed two or three years of his time and three-fourths of his savings; but he would be free of the rest, whilst the capital of the commandite partners would be sufficient to meet the loss. On the contrary, were he a borrower of the

money, he would have lost the whole of his time and savings, and besides remain indebted for the rest. Under this branch may be classed the numerous cases of inventors, who find in the system of unlimited liability considerable obstruction to the development of their inventions.

275. The principle of limited liability obtains a wider application in the case of public companies. In this country, railways, canals, docks, and other public works, are now exempt from unlimited liability, by charter or act of parliament. That the sanction of the State should be obtained for undertakings the execution of which involves an interference with the rights of property, is just in itself; but such sanction need not extend to the question of liability, that being part of the private contract between the company and the public or their creditors. In the case of joint-stock companies with a large number of shareholders, where the concern is under the exclusive management of a board of directors, the unlimited liability of all the shareholders affords an undue facility to the directors for the carrying on of hazardous and losing operations, which may bring ruin on persons who, owing to their living at a distance or other circumstances, may be wholly ignorant of the progress of the concern. With respect to banking companies, it is frequently found that wealthy men abstain from becoming shareholders in joint-stock banks, in consequence of the unlimited liability. To remedy this evil, it has been suggested that a uniform rule for banking companies should prevail, on the basis of the charters granted to the Colonial banks: viz. a fixed amount of paid-up capital; an extent of liability, on the part of the shareholders, to three or four times the amount of the capital; a restriction on the bank against incurring debts to the public, either by deposits, notes, or any other means, beyond a certain multiple of the paid-up capital; and a prohibition against engaging in any other branches of business, or making certain classes of investments.[1]

276. As banking is, in effect, a modification of trading, there

[1] See Evidence of J. W. Gilbart, Esq., to the Mercantile Law Commission, p. 135.

does not appear any reason why banking companies should not be placed in the same category as joint-stock companies, by allowing them to limit their liability to the amount subscribed, upon complying with the prescribed regulations. An exception should, however, be made with regard to those Banks which have the power of issuing their own bank-notes; these generally passing as money into the hands of those who are not in a position to appreciate the character and solidity of the bank. A similar power to limit the liability of their members should also be conceded to insurance companies, although the risk incurred by them differs from common companies, in the distant data at which they are expected to refund the amount, and in the sacred nature of the trust reposed in them generally in behalf of widows and children. It must in this, as in all transactions, be left to the care of the insured to select that company which, whether by the inherent solvency of the concern, or by the unlimited liability of the shareholders, or other circumstances, offers the most reasonable prospect of undoubted security. Much has been said as to the influence which the introduction of partnerships with limited liability into the United Kingdom might have on the state of the working classes; on the one hand, by allowing them to take an interest in the factories and mills, and on the other, by the facility which they would acquire of forming co-operative societies. The discussion of this branch of the subject, however, scarcely falls within the province of this work.

277. The statistics of partnerships of foreign countries are important to a question of so practical a character, as they show the proportion which commandite bear to other kinds of partnerships. In France, the number of partnerships of all kinds registered in 1852 were 2,806: of these 2,154 were partnerships in collective name or general partnership, 452 simple commandite, 70 commandite by shares to nominated persons, and 130 shares to bearer. In Belgium, from 1845 to 1850, there were registered 511 partnerships in collective name, and 110 in commandite.[1]

[1] Mr. William Hawse, in his valuable pamphlet on "Unlimited and Limited Liability," states that, in Europe, partnerships *en commandite* are—

278. One of the main reasons assigned against any limitation of the liability of partners, is the encouragement which would thereby be given to reckless trading; as if unlimited liability had at any time proved a preventive of the speculative mania which almost periodically prevails in the mercantile world. The records of 1824—1826, and 1835—1837, in this country, where commandite partnerships are not allowed, and similar accounts of commercial speculation in France under the commandite system, are sufficient to show that the causes of such commercial excitements must be sought for in other influences than the state of commercial legislation. It has been asserted that the commerce of Great Britain does not require any additional stimulus, and that, perhaps, a larger amount of capital is already embarked in trade than there are channels of employment. This assertion may be met by the fact, that owing to the extension of commerce to the most distant parts of the world, much larger capital is needed to be embarked, whilst longer time is required to obtain the returns. Moreover the possession of a large amount of capital by some is no reason why obstructions should be placed in the way of those less fortunate in obtaining the means by which alone their skill and industry may be exercised with a prospect of success. It has also been suggested that partnerships en commandite may not prove so successful as partnerships with unlimited liability; and again, that it is not desirable to encourage persons out of trade to employ their money in mercantile operations over which they can have no control, and the utility of which they cannot judge. These and similar arguments may be urged against the expediency of undertaking any specific business; but it is altogether beyond the duties and province of Government to act as *paterfamilias* over the private interests of any class.

Common and approved in { France and Holland.

Also common, though not generally so successful as other partnerships, in { Spain, Hamburg, Trieste.

Allowed by law, but not common; nor, when established, more successful than other partnerships, in { Belgium, Prussia, Saxony, Portugal, Venice, Naples.

And unknown in { Sweden, Leipsic.

CHAPTER V.

ON BILLS OF EXCHANGE.

Section I.—NATURE AND FORM OF BILLS AND NOTES.

279. In our brief dissertation on the progress of commerce, we have already noticed the origin of bills of exchange. On the utility of this mercantile instrument; on the metamorphosis it has effected in the commercial intercourse between countries; on the immense importance it has acquired as the representative of money, merchandise, and labour, and even as an object of commerce in itself, we need not enlarge. An attempt has been made to ascertain the magnitude and fluctuations of the amount of bills of exchange, inland and foreign, in circulation at one time in Great Britain, during the period 1828—1847 both inclusive, and it was shown that the total amount of bills, inland and foreign, amounted to an average sum of 110,018,000*l.* The enormous increase of commerce since then must have proportionally increased the amount of bills in circulation, and they may be assumed to reach at present 150,000,000*l.* sterling.[1]

280. A bill of exchange is an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid; or it may be payable to bearer. It presupposes that a certain sum of money is held by the drawer in the drawee's hands, which sum, or a portion of it, is assigned by the bill to another person; and, by the

[1] See a paper on the subject by William Newmarch, Esq. in the Journal of the Statistical Society, vol. xiv. p. 143.

acceptance of such bill, the drawee appropriates that sum to the service of that person, or any other possessing the bill, by his order.[1] The effect, however, that a bill may have of charging specific funds of the drawer in the hands of the drawee, so as to cause the proceeds of any specific property deposited with the drawee to be set apart to the payment of bills drawn upon it, has not been supported in England,[2] though it is so held in Scotland. The person who makes the bill is called the drawer; he to whom it is addressed, the drawee; and when he accepts the bill, he becomes the acceptor. The person to whom it is payable is the payee; and if he appoint another to receive the money, that other is called the endorsee, and the payee becomes with respect to him the endorser; and any one who happens for the time to be in possession of the bill, is called the holder of it. The following is the form of an inland bill of exchange:—

"£100. "London, Nov. 1, 1854.

"At sight (or on demand, or at —— days after sight, or at —— days after date), pay to Mr. ——, or order (or bearer), one hundred pounds for value received.

"THOMAS BROWN."

281. A promissory note is a written agreement to pay another person therein named, absolutely and unconditionally, a certain sum of money, at a time specified therein. Promissory notes were put on the same footing as bills of exchange by the statute of Anne, in 1705.[3] This statute was introduced into the United States of America; but in a few States there are still some restrictions on the negotiability of notes. The same is the case in the Cape of Good Hope, where the statute of Anne does not appear to be in force.[4] A promissory note differs from a bill of exchange, inasmuch as the former is a promise to pay,—the latter is an order to pay; it is only when the note is endorsed that the resemblance of the two

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[1] Minet *v.* Gibson, 1 H. Bl. 569.
[2] Laycock *v.* Johnson, 6 Hare, 199.
[3] 3 & 4 Anne, c. 9, § 1.
[4] Russell *v.* Kitchen, 6 Ir. Iur. 218.

documents begins, for then a promissory note is an order by the endorser upon the maker of the note, as debtor by the note, to pay the endorsee.[1] The following is a form of a promissory note:—

"£100. "London, Nov. 1, 1854.

"Three months after date, I promise to pay to Mr. ——, or order, one hundred pounds for value received.

"THOMAS BROWN."

282. No precise words are necessary to be used in a bill of exchange or note, provided it be clearly shown that the parties intended it to be a bill or note.[2] The principal requisites of a note are, an express promise to pay—a specific sum—payment of money—and payment absolute; and those of a bill of exchange are, an order to pay—a sum certain—the name of the payee[3]—payment of money—and payment absolute.[4] A bill or note, payable in cash or Bank of England notes, or in East India Stock, would not be valid.[5]

283. A bill or note may be drawn or endorsed with pencil,[6] or with any other specific material, provided it be in writing. The sum is usually expressed in figures and in words, and, where these are at variance, the sum in the body of the bill prevails.[7] A bill or note, except cheques on bankers, cannot be for a sum less than 20*s.*;[8] and a bill or note for any sum between 20*s.* and 5*l.*,[9] to be valid, must contain the name and abode of the person to whom it is made payable, and the

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[1] Heylin *v.* Adamson, 2 Burr. 676. Edie *v.* East India Company, Burr. 1224. Chadwick *v.* Allen, Str. 706.

[2] Shuttleworth *v.* Stevens, 1 Camp. 407. Green *v.* Davies, 4 B. & C. 235. Block *v.* Bell, 1 M. & Rob. 149.

[3] Peto *v.* Reynolds, 22 L. T. 246 Exch.

[4] Roberts *v.* Peake, 1 Burr. 325. Carlos *v.* Fancourt, 5 T. R. 482. Viscount Garnock *v.* Duke of Queensberry, M. 1401.

[5] Bolton *v.* King, 4 B. & Ad. 619. 3 & 4 Will. IV. c. 98, § 6. 7 & 8 Vict. c. 32, § 27. Martin *v.* Chauntry, Str. 1271.

[6] Geary *v.* Physic, 5 B. & C. 234.

[7] Saunderson *v.* Piper, 5 Bing. N. C. 425.

[8] 48 Geo. III. c. 88, § 2. [9] 7 Geo. IV. c. 6, & 17 Geo. III. c. 30.

signature must be attested by witnesses. A person issuing a note for less than 20*s.* is liable to a penalty not less than 5*l.* and not exceeding 20*l.*; and a person accepting a bill or note without the above requisite is liable to a penalty of 20*l.* Such bill must also bear date, and be made payable within twenty-one days after date. Generally, in bills or notes for any sum above 5*l.*, the date is not necessary; if the date be omitted, the bill is considered as dated on the day of issue;[1] but in Scotland, if a bill be blank as to date, no summary diligence or execution can be issued, and if the sum exceed 8*l.* 6*s.* 8*d.*, the date, even in an ordinary action, can be supplied only by written evidence. Although no contracts are valid if concluded on a Sunday, the simple drawing of a bill of exchange on a Sunday is not sufficient to avoid it. Post-dating of a bill, in order to evade the stamp law, is a criminal offence.[2]

284. An important requisite of a bill or note is, that it be not payable on a contingency, but at all events,[3] although it makes no difference when such an event may happen.[4] However distant the time, if it be a day that must come, it is sufficient. A bill cannot be made payable out of a supposed fund;[5] it cannot refer to the realization of any sale of goods,[6] or to the happening of any particular event uncertain in itself, but it must be payable *absolutely*. If the bill be in any wise conditional, it loses at once its essential character, and would not be negotiable. The place of payment is also specified. The bill may bear a general or a qualified acceptance, which will have the effect of regulating the duty of the holder in presenting the bill for payment. It is a general acceptance, where the bill is made payable at a banker's or other places;

[1] Sinclair *v.* Baggaley, 4 M. & W. 212. Anderson *v.* Weston, 6 Bing. N. C. 296. De la Courtier *v.* Bellamy, 2 Shaw, 422. Giles *v.* Bourne, 6 M. & S. 73.

[2] 55 Geo. III. c. 184. Serle *v.* Norton, 9 M. & W. 309.

[3] Drury *v.* Macaulay, 16 M. & W. 147. Wheatley *v.* Williams, 1 M. & W. 533. Hartley *v.* Wilkinson, 4 Camp. 127.

[4] Colehard *v.* Cooke, Willis, 398.

[5] Dawkes *v.* Earl de Loraine, 3 Wils. 207.

[6] Alexander *v.* Thomas, 16 L. T. 387, Q. B.

it is qualified, where it is payable at a banker's or other place only. Notes payable to bearer on demand, for a sum less than 20*l.* must be made payable at the bank or place where they are issued.

285. It is also essential that the name of the payee be clear, sufficiently designated, and certain. A note payable to *A* or to *B* is not a valid promissory note.[1] The payee may be described in his public capacity as the manager of a bank; but it was recently decided that a note, payable to the secretary for the time being of a company, or to the individual who at the time of the instrument falling due should be in the situation of secretary to the company, is a note payable on a contingency, and void.[2] A bill or note may be payable to an individual, or to his order, or to the bearer; but in order that a bill or note be made negotiable, it must contain the words "to order," or "to bearer." In Scotland, a bill is negotiable though not expressed to be made payable "to order," or "to bearer." A mere acknowledgment of debt, such as I O U, is not negotiable.[3] A bill or note, payable to a fictitious payee, will, against the drawer or maker, be considered as payable to bearer.[4]

286. The name of the maker of a note, or the drawer of a bill, must be subscribed at the bottom of every bill, either by the maker himself, or by some one appointed for the purpose; and the name should be written in full.[5] It is not necessary that the bill should contain the value received. Where such words are omitted, the value is presumed to have been given for the bill. A person signing his name on a blank paper, bearing a bill of exchange stamp, either as drawer, acceptor, or endorser, will render himself liable as such for any sum afterwards filled in which is covered by the stamp,[6] only, how-

[1] Blackenhagen *v.* Blundell, 2 B. & A. 417.

[2] Rex *v.* Box, 6 Taunt. 325. Storm *v.* Sterling, 23 L. T. 187, Q. B.

[3] Pirie *v.* Smith, 11, § 473. Israel *v.* Israel, 1 Camp. 499. Ellis *v.* Ellis, Gow, 216. Fisher *v.* Leslie, 1 Esp. 426.

[4] Tatlock *v.* Harris, 3 T. R. 174. Minet *v.* Gibson, Ibid. 481.

[5] Taylor *v.* Dobbins, Str. 399.
Montague *v.* Perkins, 22 L. J. N. S. C. P. 186.

ever, to *bonâ fide* holders for valuable consideration, without notice.[1]

287. A bill of exchange is either inland or foreign. It is an inland bill when made and accepted in England; it is a foreign bill when made or payable abroad. As yet, the distinction of nationalities between England, Ireland, and Scotland, has not been obliterated. A bill or note drawn in England on a party in Scotland or Ireland, and *vice versâ*, is deemed as a foreign bill, except as regards the new stamp duties. So it is in the United States of America: a bill of exchange drawn in one of the States upon a person resident in another State is a foreign bill, because each State has a separate and distinct municipal jurisprudence, and is absolutely sovereign in its political organization. Foreign bills, properly so called, are drawn in several parts, called a set. All the parts must be in all respects alike, and each ought to contain a condition that it shall be payable only so long as all the others remain unpaid, as well as mention every other part of the set. All the several parts ought to be delivered to the payee, except where one is forwarded to the drawee for acceptance. The usual form of foreign bills is as follows:—

"London, Nov. 1, 1854. "Exchange for 1,000 francs.

"At two months after date (or at sight, or at one or more usances), pay this my first bill of exchange (second and third of the same tenor and date not paid) to Messrs. —— or order (or bearer), one thousand francs, value received, and place them to account.

"William Jones.

"To M. ——, Paris."

288. The bill, once drawn and completed, cannot be altered without the consent of the parties. An alteration made in the sum, or any other material part, would be sufficient to discharge the acceptor;[2] and no evidence is admitted of a collateral or concomitant circumstance to vary the purpose of the bill or note.[3]

[1] Hatch *v.* Searles, 22 L. T. 280 (V. C. S.) 23 L. T. 467.

[2] Burchfield *v.* Moore, 23 L. T. 143, Q. B.

[3] Foster *v.* Jolly, 1 C. M. & R. 705. Master *v.* Miller, 4 T. R. 320.

289. The laws of foreign countries prescribe in detail the requisites of bills of exchange and promissory notes. By the new law of Germany, and by the Russian Swod, and the law of Sweden, the words, "bill of exchange," must be inserted in the bill. In France, the essential character of a bill, as the remittance of money from one place to another, has been preserved in the Code; a bill must be drawn in one place, and payable in another; it must bear date, and state the sum to be paid, the name of the drawee, the time and place of payment, the value given and in what kind, and the name of the payee. When a bill is wanting in any of the above requisites, it is held as a simple promise, and not negotiable. Bills of exchange contain also other clauses, such as "In case of need, at Messrs. ———," or, "Au besoin chez Monsieur ———." This is a provision by the drawer that, in case of non-payment by the drawee or acceptor, the holder may obtain payment from another person in the same place.

Section II.—STAMP DUTIES ON BILLS AND NOTES.

290. A bill or note cannot be issued or circulated unless it be duly stamped. A new statute on stamp duties has been enacted, extending over Great Britain and Ireland, which came into operation on the 9th of August, 1854.[1] The stamp duties on bills and notes are now regulated by a uniform scale according to the amount, and irrespective of the date at which the bills or notes may be drawn or issued. These duties, however, did not come into operation until the 11th of October. All inland or foreign bills issued in this country prior to that date are still subject to the old stamp duties; nor did any alteration take place until the 11th October as to the negotiation or payment of unstamped foreign bills, drawn abroad and payable in this country, or foreign bills drawn abroad and payable abroad, but negotiated to English merchants. In all such cases the law was not altered till the 11th October, and therefore, though dealt with as by the old law,

[1] 17 Vict. c. 83.

such documents would not be invalid. If, however, such bills became payable after the 11th October, the holder must affix to them an adhesive stamp of the proper value, before he indorses, transfers, negotiates, or presents each for payment; but adhesive stamps are not applicable to inland bills, or foreign bills drawn in this country, which must, in both cases, be drawn upon stamped paper as hitherto.

The stamp duties are as follow:—

Inland Bills of Exchange, Draft, or Order, for the Payment to the Bearer or to Order, at any time otherwise than on Demand, of any Sum of Money.

			£	s.	d.
Not exceeding		£5	0	0	1
Exceeding	£5 and not exceeding	10	0	0	2
„	10 „	25	0	0	3
„	25 „	50	0	0	6
„	50 „	75	0	0	9
„	75 „	100	0	1	0
„	100 „	200	0	2	0
„	200 „	300	0	3	0
„	300 „	400	0	4	0
„	400 „	500	0	5	0
„	500 „	750	0	7	6
„	750 „	1,000	0	10	0
„	1,000 „	1,500	0	15	0
„	1,500 „	2,000	1	0	0
„	2,000 „	3,000	1	10	0
„	3,000 „	4,000	2	0	0
„	4,000 and upwards		2	5	0

Promissory Notes, for the Payment in any other manner than to the Bearer on Demand, of any Sum of Money.

			£	s.	d.
Not exceeding		£5	0	0	1
Exceeding	£5 and not exceeding	10	0	0	2
„	10 „	25	0	0	3
„	25 „	50	0	0	6
„	50 „	75	0	0	9
„	75 „	100	0	1	0

Promissory Notes, for the Payment either to the Bearer on Demand, or in any other manner than to the Bearer on Demand, of any Sum of Money.

			£	s.	d.
Exceeding	£100 and not exceeding	£200	0	2	0
„	200 „	300	0	3	0

				£	s.	d.
Exceeding	£300, and not exceeding		£400 . . .	0	4	0
„	400	„	500 . . .	0	5	0
„	500	„	750 . . .	0	7	6
„	750	„	1,000 . . .	0	10	0
„	1,000	„	1,500 . . .	0	15	0
„	1,500	„	2,000 . . .	1	0	0
„	2,000	„	3,000 . . .	1	10	0
„	3,000	„	4,000 . . .	2	0	0
„	4,000 and upwards		. . . . .	2	5	0

291. Stamp duties are now chargeable on all bills of exchange drawn out of the United Kingdom, which may be paid, endorsed, transferred, or otherwise negotiated within the United Kingdom, wheresoever the same may be payable.[1] Every bill purporting to be drawn at any place out of the United Kingdom is henceforth subject to stamp duties as foreign bills, notwithstanding that, in fact, the same may have been drawn within the United Kingdom.[2] The duties are denoted by adhesive stamps, *to be affixed by the holder of the bill before he presents the same for payment, or endorses, transfers, or in any manner negotiates such bill*, cancelling the stamp so affixed by writing thereon his name, or the name of his firm, and the date of the day and year on which he wrote the same, so that the same stamp may not be used for other purposes. Any person who presents for payment, or pays, endorses, or negotiates such bills, without an adhesive stamp being duly affixed, or any person refusing or neglecting to cancel such stamp, incurs the penalty of 50*l.*, whilst such bill becomes invalid as an evidence in court, and no person can recover thereon.[3] The duty of stamping the bill lies not with the acceptor, but with the first holder; nor is it necessary that it be stamped before acceptance, except that before paying it the acceptor must see that the bill was duly stamped. Even when a bill is sent to the drawee himself in payment, and the same is never accepted, but cancelled, the bill must be stamped, so that it may be produced as evidence of payment.

[1] 1 Vict. c. 83, § 3. [2] Ibid. § 4. [3] Ibid. § 5.

292. Any person drawing or issuing in the United Kingdom any bill of exchange payable out of the United Kingdom, purporting to be drawn in a set, and who should not draw and issue on stamped paper the whole number of bills which such bill purports the set to consist of; or any person transferring or negotiating, within the United Kingdom, any such bill (drawn or issued in the United Kingdom) purporting to be drawn in a set, and not at the same time transferring and delivering, on paper duly stamped, the whole number of bills which such bill purports to consist of, such person becomes liable to a penalty of 100*l.*; and any person receiving the same, either in payment or as a security, without having transferred or delivered to him, duly stamped, the whole number of bills included in the set, would not be entitled to recover on such bill, or make the same available for any purpose whatever.[1]

293. The following are the present stamp duties on foreign bills:—

Foreign bills of exchange drawn in, but payable out of, the United Kingdom: if drawn singly, or otherwise than in a set of three or more, the same duty as on an inland bill of the same amount and tenor. If drawn in sets of three or more, for every bill of each set,—

			£	s.	d.
Where the sum payable thereby shall not exceed	£25	.	0	0	1
And when it shall exceed £25, and not exceed	50	.	0	0	2
„ 50 „	75	.	0	0	3
„ 75 „	100	.	0	0	4
„ 100 „	200	.	0	0	8
„ 200 „	300	.	0	1	0
„ 300 „	400	.	0	1	4
„ 400 „	500	.	0	1	8
„ 500 „	750	.	0	2	6
„ 750 „	1,000	.	0	3	4
„ 1,000 „	1,500	.	0	5	0
„ 1,500 „	2,000	.	0	6	8
„ 2,000 „	3,000	.	0	10	0
„ 3,000 „	4,000	.	0	13	4
„ 4,000 and upwards		. . . .	0	15	0

[1] 17 Vict. c. 83, § 6.

Foreign bills of exchange, drawn out of the United Kingdom, and payable within the United Kingdom, require a stamp of the same duty as on an inland bill of the same amount and tenor: if drawn in a set, it is sufficient that one of the set be stamped with the full rate. Foreign bills of exchange, drawn out of the United Kingdom, and payable out of the United Kingdom, but endorsed or negotiated within the United Kingdom, require a stamp of the same duty as on a foreign bill drawn within the United Kingdom, and payable out of the United Kingdom.

294. If any material part of a bill or note, such as the time or place of payment, or the sum, be altered, a new stamp is necessary;[1] so if a name were inserted, as "payable at Messrs. ——, Chiswell-street," without the acceptor's knowledge, the alteration would be material, because it would lead to a presentment at Messrs. ——, and not at his own house, which might cause the bill to be treated as dishonoured without any presentment at the place where the acceptor expected it. But to require a new stamp, the alteration must have been made after the bill was issued; and the bill is not considered as issued until it has been passed away by the drawer or maker, and accepted by the payee.

295. If a stamp be necessary to the validity of a bill of exchange drawn or made in a foreign country, then, unless it had such stamp, the bill ought not to be received as evidence in our courts of justice. A contract must be valid where it is entered into, or otherwise it is void all the world over. But the revenue laws of other countries are not regarded as binding in international jurisprudence.

Section III.—PARTIES TO A BILL OR NOTE.

296. All who have capacity to contract may draw, endorse, or accept a bill of exchange. In this are comprised all persons of age, sound mind and understanding, whether males or females, alien friends, trustees, agents, guardians, executors,

[1] Bowman *v.* Nichol, 5 T. R. 537. Knill *v.* Williams, 10 East, 431.

and administrators; excepting infants, married women, or persons insane or imbecile of mind, who are incompetent to bind themselves by such an instrument. For further information on this head the reader is referred to the chapter on Merchants.

Section IV.—ENDORSEMENT.

297. A bill of exchange originally was always made payable to a specific individual. The words, "or order," by which the bill is made transferable, are comparatively of recent invention, and they are ascribed to Cardinal Richelieu, between 1624—1642. A bill or note *not* containing the direction to pay "to the order of the payee," or "to bearer," though valid is not transferable.[1] In Scotland, however, this clause is not essential to the negotiability of the bill.[2]

298. No particular form is necessary for an endorsement, provided that it contains the signature of the endorser at the back of the bill, and that there be a delivery with intent to pass the property in the bill to the endorsee. The endorsement, however, may be made in any part of the bill, and even in another paper annexed thereto; but it must be in writing, though it may be in ink or pencil. If the bill or note be for less than five pounds, the endorsement must specify the name and the place of abode of the endorsee, it must bear date, and be attested by a subscribing witness. A bill may be transferred by endorsement to a given person and to his order, or by blank endorsement and delivery to him. In order, however, to effect a valid transfer, it is not sufficient to put the signature on the back of a bill: that is only an act towards it. To constitute a legal and valid endorsement of a bill of exchange, there must be an evident intention to transfer, and the manual delivery of the bill to the endorsee.[3]

299. A bill of exchange is a negotiable instrument, the property of which passes by delivery. It is enough if the

[1] Smith *v.* Kendall, 6 T. R. 123.

[2] Chrichton *v.* Gibson, January 1726.

[3] Sainsbury *v.* Parkinson, 18 L. T. 198, C. B.

owner received such a bill *bonâ fide* and for value, to give him full authority to transfer it; and the property vests in the endorsee, by whatever way the endorser got possession of it. The holder coming fairly by a bill or note, has nothing to do with the transaction between the original parties. Although a bill was stolen, the title of a *bonâ fide* holder would not be liable to any extrinsic objections; it is sufficient if he can prove that good consideration was really given for the bill, and that he actually took it *bonâ fide*.[1] Where a bill has been transferred by endorsement to a specific person, a thief or a finder could convey no interest in it to another person. It is only when it is transferable by mere delivery, that he might convey a title to a person receiving it *bonâ fide*. But in all cases the utmost caution must be proved to have been used by such person in the acquisition of such bill, in order that he may be able to sustain his title against the original owner of it.[2] It is the same for notes endorsed in blank, and notes payable to bearer, and also for exchequer bills, which, when taken *bonâ fide* and for a valuable consideration, pass by delivery.[3]

300. The negotiability of a bill may be restrained by special endorsement, either by describing the specific object or use for which it is to be applied, or by making it payable to a particular party only, in which case the endorsee would not acquire a general unlimited authority, and third persons who take it notwithstanding such restriction, would take it at their own peril, provided, however, the restriction be clearly expressed, as it would not be presumed from equivocal language.[4] Every endorsement is in the nature of a new bill; and, if there are several endorsers, each becomes individually liable as a new drawer, so long as the bill remains in circulation.[5]

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[1] Miller *v.* Race, Burr. 452. Lawson *v.* Weston, 4 Esp. 56.

[2] Solomons *v.* Bank of England, 13 East, 135. Goodman v. Harvey, 4 Ad. & E. 870. Gill *v.* Cubitt, 3 B. & C. 466.

[3] Vookey *v.* Pole, 4 B. & Ald. 1.

[4] Archer *v.* Bank of England, 2 Doug. 637. Sigourney *v.* Lloyd, 5 Bing. 525.

[5] Pleylyn *v.* Adamson, 2 Burr. 669.

301. A bill of exchange for any sum above five pounds may be endorsed either before the time of maturity or afterwards; but though its negotiability continues, there is a difference in the credit attached to the instrument. So long as the bill or note is not due, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit; but if the bill or note be over-due, though it is still negotiable, yet it is out of the common course of dealing, and does give rise to suspicion. So it is just that the endorsee should take it, subject to all equities and objections to which it is subject in the hands of the endorser, so far as they are intrinsic to the bill.[1] These objections, however, must be in the note itself, and not collateral and independent of the note transaction, such for example as any right of set-off against a former holder. In Scotland, the endorsee of a bill over-due is not subject to latent objections attaching to the bill, if there be no mark of dishonour on the bill, and nothing suspicious in the transaction.[2]

302. The property in a bill may also be transferred without endorsing or putting the name on it, and the party transferring it would incur no liabilities except such as are incident to the transfer itself.[3] So he warrants that he was the lawful holder of the bill, and that the bill is not fictitious or forged.[4] If he knew the bill to be bad, it would be like sending out a counterfeit into circulation to impose upon the world, instead of the current coin. Generally, where a bill of exchange is transferred by the endorsee by delivery only, without any fresh endorsement, the transferee takes as against the acceptor any title which the intermediate endorsee possessed.[5] An endorsement admits all antecedent endorsements, and the endorser becomes thereby liable, notwithstanding prior endorsements bore false signatures, because he stands in the capacity of the

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[1] Brown *v.* Davies, 3 T. R. 80. Boehm *v.* Sterling, 7 T. R. 428.

[2] Wilke *v.* Wilson, 16 F. C. 361.

[3] Fenn v. Harrison, 3 T. R. 757.

[4] Jones *v.* Ryde, 5 Taunt. 488.

[5] Fairclough *v.* Sterling, 23 L. T. 187, Q. B.

drawer of a new bill. The endorsee, moreover, acquires a right of action against all parties whose names are on the bill, in case of non-acceptance or non-payment.

303. The right to transfer a bill rests in the payee or his assigns. An infant could convey no interest by an endorsement. If a bill is payable to a single woman, and she marries, her husband is the proper person to transfer it.[1] A bill may be transferred by the personal representative of a deceased payee,[2] or by the assignees of one who became bankrupt.[3]

304. The endorsement of bills or notes in most countries of the continent of Europe must be special or complete. The French code demands that the endorsement shall contain the date, the value furnished, and the name of the endorsee. In Sardinia and other Italian States, full endorsements are required. The German law sanctions blank endorsement. It is important to observe that a bill transferred by blank endorsement, in a country where complete endorsement alone is sufficient, would not give a right of action in this or any other country.

Section V.—PRESENTMENT FOR ACCEPTANCE.

305. It is always advisable to present bills for acceptance without delay, in order that the holder may exonerate himself from the responsibility of any possible contingency. Presentment is necessary when the bill is drawn payable at sight, or at a certain period after sight;[4] and the presentation must take place within a reasonable time, using always prompt diligence, according to the case in question. Though the bill need not be sent for acceptance by the very earliest opportunity, there must be no improper delay; and it would be no answer to the objection of laches, that the parties remained perfectly solvent from the date of the bill to the day of presentment, and that no

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[1] Mason *v.* Morgan, 2 Ad. & E. 31. Hart *v.* Stevens, 6 Q. B. 937.

[2] Rawlinson *v.* Stone, 3 Wils. 1.

[3] Yates *v.* Sherrington, 11 M. & W. 42; overruled, 12 M. & W. 855.

[4] Muilman *v.* D'Eguino, 2 H. Bl. 565. Mellish *v.* Rawdon, 9 Bing. 416.

actual loss was occasioned by the delay.[1] Bills payable at a certain time after date, or on demand, need not be presented for acceptance.[2] In the United Kingdom, no specific time is allowed for the presentation of foreign bills; in all cases, reasonable diligence is required. In other countries, however, the law fixes the times allowed within which such bills must be presented, and these times vary with the place where the bill is drawn, and the place where the bill is payable.

306. To charge the drawer of an unaccepted bill, some actual evidence of a demand to accept must be proved. In England, proof of presentment may be made by oral evidence; but in Scotland, presentation can only be proved by notarial protest; and the drawee may have the whole day to view the bill, and deliberate to accept it or not. If the party cannot be found at his usual residence, the holder may consider him as absconded; but if he has only changed place, the holder must endeavour to find him out.

Section VI.—ACCEPTANCE.

307. An acceptance is an engagement to pay the bill when due. The party to whom the bill is addressed, or any one for his honour, can alone accept it. If the drawee be an infant, or a married woman, or an alien enemy, the holder may consider the bill as dishonoured. A bill drawn on several persons not in partnership must be accepted by each party individually; but if they are partners, the acceptance of one will bind all the others. The acceptance of an inland bill must be in writing on the bill;[3] but it is not essential that the name of the acceptor should be signed. Any other expression purporting to express acceptance would be sufficient. In Scotland, a written promise on a separate paper to accept a bill would amount to acceptance, though the bill so accepted

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[1] Mullick *v.* Radakissen, 23 L. T. 25 P. C.

[2] Blesard *v.* Hirst, 5 Burr. 2670.

[3] 1 & 2 Geo. IV. c. 78, for England; 8 & 9 Geo. IV. c. 24, for Ireland. Mahoney *v.* Ashlin.

would not be entitled to the same privileges of summary execution.

308. The acceptance of foreign bills in England need not be in writing on the bill; the acceptance may be verbal, or on a separate paper, provided it be communicated to the party who takes the bill, and he is induced by the promise to take it;[1] and as it has already been stated that England, Scotland, and Ireland are still considered foreign to each other, a bill drawn in England on a person in Scotland, or drawn in Ireland on a party in England, being deemed a foreign bill, might be accepted verbally, or by any other document distinct from the bill.[2] Such words as the following, would be considered to imply an acceptance: "I promise that it shall meet with due honour;" "I will accept, or certainly pay;" "Leave the bill, and I will accept it;" or, "Send the bill to my counting-house;" but if the drawee says, "I will give direction for its being accepted," that is not of itself an acceptance; "That is your bill, it is all right," is no acceptance. If the drawee keeps the bill which has been presented to him for acceptance, or destroys it, that would be deemed an acceptance. It is, however, understood that where a bill is sent by post to the drawee for acceptance, he may detain it for a few days without incurring liability as an acceptor.

309. An acceptance may be conditional, varying the absolute terms of the bill either in the sum, the place, the time, or the mode of payment. The holder is at liberty to accept or refuse such conditional acceptance; but in the latter case, he must protest the bill as for non-acceptance. Generally the acceptance is expressed by the drawee signing his name on the bill; but such words as "Presented such a day," or only the day of the month, or "Presented," "Accepted," "Seen," are sufficient to amount to an acceptance.[3]

310. So long as the bill remains in the drawee's hands, the acceptance is not fully binding on him; it is not the act of

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[1] Pierson *v.* Dunlop, 2 Cowp. 572. Pillans *v.* Van Mierop, 3 Burr. 1663.
[2] Wynne *v.* Raikes, 5 East, 514. [3] Dufaur *v.* Oxenden, 1 M. & Rob. 90.

writing something on the bill which constitutes the acceptance, but it is the act of communicating to the holder what is written that binds the acceptor. Therefore an acceptor, who has put his signature to a bill but has not parted with it, may, before he does part with it, change his mind, and erase the acceptance, and say, "I have not yet entered into an engagement to accept.[1] In Holland, when once the bill has been accepted, the drawee cannot withdraw, efface, or cancel the acceptance, even though he had not parted with it, and he would be not less bound to payment. The same has been established by the new law in Germany.

311. The liability of an acceptor even of an accommodation bill, can only be discharged by payment or release;[2] nothing but an express declaration of the holder will discharge the acceptor of a bill.[3] The drawee, by accepting the bill, admits that it has been regularly drawn, and he cannot afterwards deny the authority of the drawer to draw and endorse such bill.[4] If the bill is not accepted by the drawee, it may be accepted by any party for the honour of the drawer or of any of the endorsers: this, however, does not render it less incumbent on the owner of the bill to present it for payment to the drawee when the bill becomes due. It is equivalent to say to the owner of the bill, "Keep this bill, don't return it; and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me, and you shall have the money."[5]

Section VII.—PRESENTATION FOR PAYMENT.

312. The principal points in connexion with this part of our subject, are the time when the bill becomes due—the place where it is payable—the mode of presentment—the

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[1] Cox *v.* Troy, 5 B. & Ald. 474. Grant *v.* Hunt, 1 C. B. 44.

[2] Fentum *v.* Pocock, 5 Taunt. 190.

[3] Dingwall *v.* Dunster, 1 Doug. 247.

[4] Price *v.* Neal, 6 Taunt. 76.

[5] Hoare *v.* Cazenove, 16 East. 391. Williams *v.* Germaine, 7 B. & C. 468.

person by whom the bill is to be presented—the person to whom it is to be presented—and, lastly, what will excuse or justify a want of presentment. First, then, the time when the bill becomes due. It is all-important that the holder of a bill of exchange should not be guilty of any neglect in the presentment of the bill. If it cannot be proved that the bill has been presented on that very day when it became due, the drawer and endorsers will be discharged, and the holder cannot excuse himself by stating that it would have proved useless.[1] Even a presentment for payment prematurely, or before the bill became due, would be inoperative.[2]

313. Although a bill or note is expressed to become due on a given day, it does not become payable until three days after the expiration of such time. These days are called days of grace, and they form an essential part of the contract, so that the bill or note does not become due, in fact or in law, till the last day of grace.[3] If it happen that the last day of grace is a Sunday, or Good Friday, or Christmas-day, the bill must be presented on the second day; in Scotland, however, Christmas-day and Good Friday not being held as holidays, bills are presented on the third day as usual. The days of grace are not allowed on bills payable on demand, or on cheques, but they are allowed on all bills of exchange and promissory notes, whether they are payable at a certain time after date or after sight, or even at sight. The three days are reckoned exclusive of the day on which the bill falls due, and inclusive of the last day of grace.

314. Days of grace vary in almost all mercantile towns and countries, but the tendency of modern legislation is to abolish them altogether. In France, Belgium, Lombardy, Tuscany, the Two Sicilies, and other States, where the French Code has been introduced, there are no days of grace. So, throughout the German States they are altogether done away. In Great Britain and Ireland, and the United States of

[1] Nicholson *v.* Gouthet, 2 H. Bl. 610. Esdaile *v.* Sowerby, 11 East. 113.

[2] Wiffen *v.* Roberts, 1 Esp. 261.

[3] Brown *v.* Harraden, 4 T. R. 148.

America, there are three days; in Denmark, there are eight days; in Sweden, six days; in Russia, three days for bills at sight, ten days for bills at a fixed time; in the Canton of Berne, Switzerland, six days; in Spain and Portugal, none; and in the Netherlands none.

315. The Law Merchant respects the religion of different peoples. A Jew would not be bound to pay a bill on a day sacred to him. So if the first day of grace should be on Saturday, and Monday Christmas-day, and the maker a Jew, the note would be payable on Friday. The word month means generally a calendar month. A note dated on the 30th of August would end with the corresponding day of the month, and if there be none, on the next day. In calculating the day when the bill falls due, the day of the date is always excluded; so a bill drawn on the first of January, at ten days after date, would become due on the 11th, and not on the 10th.

316. The difference between the old and new style—between Russia and other States—in calculating the time of payment, requires to be referred to here. The Julian Calendar, computing the year by 365¼ days, was proved to be eleven minutes in excess, so that every 130 years the equinox receded one day. The Gregorian Calendar was thereupon adopted in 1577, and introduced in 1582, and eleven days were dropped, from the 4th to the 15th October. A year was taken to be 365 days, 5 hours, 49 minutes, and 12 seconds. Almost all countries adopted the new calendar at different periods, except Russia; the consequence of which is, that a bill drawn in this country on the first of January, new style (that is, the 20th of December, old style), payable at St. Petersburg at one month after date, would be held there as drawn on the 20th of January; and a bill drawn in St. Petersburg on the 1st of January (old style), at one month, payable in England, would be payable on the 13th February (new style). This is the difference between what is technically called the old and new style.[1]

[1] Bayley on Bills, c. vii. § 1, p. 249.

317. A bill of exchange may be drawn at usance, that is, at such time as is usually appointed for the payment of bills between the two countries: the word usance, therefore, varies in meaning with the different countries. Between some countries, a usance means one month; between others, two; and others, three. A bill payable at usance is always construed according to the meaning attached to it where the contract is made. A usance between London and Dantzig, Leipsic and Vienna, is fourteen days after acceptance; between London and Frankfort, fourteen days after sight; London and Lisbon and Oporto, thirty days' sight; London and Paris, Geneva and Malta, thirty days' date; London and Barcelona and Cadiz, sixty days after sight; London and New York, sixty days after sight; London and Amsterdam, Rotterdam, Antwerp, Altona, Bremen, and Hamburg, one month after date; London and Bilboa, two months after date; Lonon and Madrid and Gibraltar, two months after sight; London and Leghorn, Genoa, Venice, Naples, and Palermo, three months after date.

318. A bill or note must be presented for payment at the place where it has been made payable, and at reasonable hours, according to the custom of the place, and even according to the custom of the drawees. Thus, when the bill is payable at a banker's, a bill must be presented during the banker's business hours. A bill accepted payable at a banker's or other place, without any other expression in the acceptance, is considered as accepted generally; the holder may present it at the house of the acceptor, or at the place described. If, however, the acceptance makes the bill payable at a banker's house or other place only, and not elsewhere, the acceptance is deemed qualified, and demand of payment must be made at such place.[1] But where the words, "payable at," are written beneath the body of a promissory note, they constitute a memorandum only, and do not form part of the contract.

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[1] 1 & 2 Geo. IV. c. 77. De Bergareche *v.* Pillins, 3 Bing. 476.

319. Presentment may be made at the drawee's dwelling-house, or at his counting-house.[1] If there be no particular and certain place appointed other than a city at large, and the party has no residence there, the bill may be protested on the day appointed, using in all cases due diligence to find out the party. But if the party has changed residence, the holder must make endeavour to find it. Where the party has absconded, presentment is unnecessary; if he has removed out of the State, it would be sufficient to present the same at his former place of residence.[2] In the city of London, it is usual, when the drawee cannot be found, to pass the bill to the notary, who takes it to the Exchange, and draws up a notice that such a bill, accepted, became due on such a day. The holder must demand present actual payment, and in money; cheques or other drafts are not sufficient. The bill should be presented for payment by the holder, or his authorized agent, and be presented to the acceptor or maker himself. If he be a bankrupt, it will be sufficient to present the bill at his counting-house or place of abode; if dead, to his executor or administrator. The bankruptcy or death of the acceptor would not excuse a presentment;[3] such a neglect could only be justified by inevitable accident, such as a serious illness of the holder or his agent, public war, or any other irresistible force; but in all cases the plea would be at an end as soon as the impediment has been removed.

Section VIII.—PROTEST.

320. When acceptance or payment is absolutely refused, or offered conditionally, or qualified, the holder must have the bill protested, and send immediate notice to the party from whom he intends to be reimbursed. A neglect to protest, or to give notice of dishonour, would discharge such parties. A protest

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[1] Fayle *v.* Bird, 6 B. & C. 531. Turner *v.* Hayden, 4 B. & C. i. 3.

[2] Philips *v.* Astling, 2 Taunt. 206.

[3] Russell *v.* Langstaffe, Doug. 497. Esdaile *v.* Sowerby, 11 East. 114. Howe *v.* Bowes, 16 East. 112.

is a solemn declaration on behalf of the holder against any loss to be sustained by the non-acceptance or the non-payment of the bill. It is performed by a public officer, who, after due presentation of the bill to the drawee, makes a minute on the bill, consisting of his initials, the date of the day, and his charge. This is followed by a solemn declaration of the refusal, and of the intention of the holder to recover all damages which may be thereby sustained. The minute is termed the noting of the bill; the solemn declaration, the protest.

321. The protest should be made by a notary public, and if there be no notary, by an inhabitant of the place, in the presence of two witnesses. An attorney or solicitor may act as a notary public. Inland bills may be protested, in England, for non-acceptance or non-payment, but it is not imperative to do so,[1] and in practice a protest is seldom made; foreign bills, however, must be protested.[2] In Scotland a protest is always necessary for an inland or foreign bill, in order to preserve recourse against the drawer and endorser.[3] The protest should be entered at the place where the bill is made payable, and on the day on which acceptance or payment is refused.[4]

Section IX.—NOTICE OF DISHONOUR.

322. The holder is required to give prompt notice of the refusal or acceptance of payment to his immediate endorser, or to those from whom he intends to be indemnified.[5] The notice must be sent as early as can conveniently be done, and where the parties do not live in the same place, it is usual to send it by next post, or, where that is impracticable, by the next convenient opportunity.[6] In Scotland, notice of dishonour given

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[1] Windle *v.* Andrews, 2 B. & Ald. 696.

[2] Rogers *v.* Herron, 27 R. 713. Gale *v.* Walsh, 5 T. R. 239.

[3] Fergusson *v.* Belsh, 13 F. C. 244.

[4] Mitchell *v.* Baring, 10 B. & C. 4.

[5] Tindal *v.* Brown, 1 T. R. 167. [6] Muilman *v.* D'Eguino, 2 H. Bl. 565.

within fourteen days is sufficient to preserve recourse.[1] Where the party entitled to notice resides in a distant foreign country, the notice should be sent by the next packet-ship or sailing ship.

323. The notice must be sent by the holder, or by the party entitled to call for reimbursement, or also by an agent or banker, and the notice given by the last endorsee to the drawer will operate as a notice from each endorser.[2] Where the holder of a bill intends to charge an earlier party to the bill by notice of dishonour from himself, he must send him the notice as promptly as if to his own immediate endorser. It is no reason that no injury was produced to the drawer or endorser by the neglect of sending a notice. They would still be discharged.

324. To render a notice of dishonour valid, it must plainly notify the fact that the bill has been dishonoured after the presentment took place. The notice must state what the bill is, and that payment has been refused by the acceptor.[3] The following notice, for example, was held insufficient:—"The note for 200*l.* drawn by ———, dated 18th July last, payable three months after date, and endorsed by you, became due yesterday, and is returned to me unpaid." Such a notice was invalid because it did not state that the bill had been presented. The following is a form of notice which contains all the requisites:—"Sir, I hereby give you notice that the bill of exchange, dated the 22d ult., drawn by *A B* of ——— on *C D* of ———, for 400*l.*, payable one month after date to *A B* or his order, and endorsed by you, has been duly presented for payment, but was dishonoured, and is unpaid: I request you to pay me the amount thereof." A notice may also be given verbally, provided there be enough to warrant the assumption that the party to whom the notice is given is informed that the bill has been duly presented and dishonoured, and that he is looked to for payment;[4] and any

[1] 12 Geo. III. c. 72. Darbishire *v.* Parker, 5 East, 2.

[2] Chapman *v.* Keane, 3 Ad. & E. 193. Harrison *v.* Rose, 15 M. & W. 231.

[3] Strange *v.* Price, 10 Ad. & E. 125. Bailey *v.* Porter, 14 M. & W. 44.

[4] Rousego *v.* Conne, 2 M. & W. 348.

declaration by him amounting to an acknowledgment of liability, or to a promise to pay, made to any party applying on behalf of the party entitled to payment, is good evidence of notice of dishonour.[1] There are certain circumstances that will excuse notice, especially where there is a moral and physical impossibility of so doing, and when the bill is of no value for want of a sufficient stamp, or when the holder does not know where the party entitled to notice is to be found; but the utmost circumspection is needed to give timely and proper notice, in order to preserve the right of recourse. The question of notice and protest, considered in its relation to international law, refers in the first case to the interpretation of contract, and in the second to the mode of remedy. Therefore the notice to the drawer and endorser is regulated by the law of the place where the bill was drawn or endorsed, and the protest by the law of the place where the bill is made payable.

Section X.—PAYMENT.

325. The payment must be made to the holder of the bill or his assigns, and the acceptor has the whole day to pay; but once refused, the bill is considered dishonoured. Payment should be made in the coin or value designated in the bill. Goods or notes, or cheques, will not satisfy, but Bank of England notes are valid tender in England, as Bank of Scotland or Bank of Ireland notes are valid tender in the respective countries. An offer of part payment is not good, and, where the whole is due, a tender for part would be bad even *pro tanto*. The acceptor of the bill, having by his acceptance admitted the genuineness of the form of the drawer, cannot afterwards prove that the bill was forged. When money has been paid under a mistake of facts, it may be recovered as having been paid without consideration; but the mistake must be discovered on the morning of the day payment has been made,

[1] Jones *v.* O'Brien, 2 Com. L. Rep. 853, (C. B.)

and notice thereof given to the holder of the bill, in time to enable him to give notice of dishonour to prior parties.

326. The holder of the bill cannot, without the consent of the drawer or endorser, give the acceptor further time for payment; he may make what arrangements he pleases with the acceptor, provided, however, he does not alter thereby the situation of any other person on the bill, to the prejudice of that person, in which case he does it at his peril; so he may delay in suing the acceptor, without discharging thereby the drawer or endorser, because such delay does not prevent them from doing what, on receiving notice of non-payment by the acceptor, they are authorized in doing themselves. The several parties on a bill are chargeable in different order, commencing with the acceptor and last endorser, back to the first endorser; but the suing or taking a security from one of the parties liable, does not discharge another who is liable prior to him in point of order. The holder has a right, however, to have recourse to any of the parties in the bill indiscriminately, by transmitting, as we have seen, direct and timely notice of dishonour to him.

327. In England and Ireland, a claim on a bill of exchange can only be enforced by common action, and the debtor may produce the want of existence of an actual and valid consideration. A consideration is anything given for the bill, some benefit conferred on, or some detriment suffered by the party, in consideration of which the bill is given to him; but the consideration must not be illegal or immoral; bills founded upon such would be void. In Scotland, payment of bills may be enforced summarily without an action, by a decree of registration. It is necessary that the protest should be registered on the books of a competent court, within six months from the date of the bill in case of non-acceptance, or within six months from the day of payment in case of non-payment.[1]

[1] A bill was introduced last session in the Houses of Lords and Commons, to permit the registration of dishonoured bills of exchange and promissory

All actions upon bills or notes must be brought within six years, after which the remedy is taken away. The Statute of limitation begins to operate from the time when the bill becomes due. Upon a bill payable after sight, as it must be presented for payment, the statute will run from the presentment; on a bill payable on demand, from the date of the bill. In Scotland, a similar period of six years prevails for prescription, yet the remedy there is not altogether extinguished; proof by other writings under the debtor's hands, or by reference to the oath of the debtor, may be made up to the end of forty years; but after that period the debt is altogether extinguished. The question of limitation is regulated by the law of the place where the action is brought, and not by that of the place where the bill is made. In France, all actions on bills of exchange or promissory notes are prescribed after five years; in Prussia, after one year from the day of protest, the bill loses its inherent force.

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notes in England, and to allow execution thereon. It was thereby proposed to allow all bills or notes to be protested by an attorney or solicitor; the same to be registered in a competent court, upon which an order for the payment within six days should be issued; and upon the expiration of six days after the service of such order, execution to issue against the party. The bill having met with considerable opposition in the House of Commons, and having been subjected to numerous alterations, was eventually withdrawn. The question of introducing into England and Ireland the Scottish system of summary diligence on bills of exchange and promissory notes, has formed the subject of inquiry of the Committee of the Law Amendment Society, who considered the beneficial working of the system in Scotland a sufficient recommendation for its being extended to the United Kingdom generally. Even as a question of jurisprudence, the Committee considered that the Scottish system was founded on the principles of substantial justice. The holder of an instrument, which bears on its face an acknowledgment of a debt as of a liquidated sum, should be *primâ facie* entitled to receive payment without any preliminary proceeding; whereas, in England, extensive facilities exist for the acceptor of a bill of exchange in procuring delay, by raising frivolous and vexatious questions. Pleas, demurrers, changes of venue, motions for a new trial, and all the machinery of the law's delay, are avoided in Scotland by a simple and natural system. The same course is also pursued in most of the European States.

328. If a bill of exchange is drawn in one country and payable in another, and the bill is dishonoured, the drawer is liable according to the law of the place where the bill was drawn, and not according to the law of the place where the bill is made payable. But where a bill is drawn generally, the liabilities of the drawer, the acceptor, and endorsers, are governed by the law of the country in which the drawing, acceptance, and endorsement, respectively took place.

Section XI.—BANK CHEQUES.

329. A cheque is an appropriation of the drawer's funds, in the hands of the banker, to the amount thereof. Cheques are distinguished from bills of exchange, in that they are always drawn on a bank or banker; they are payable immediately on presentment, and without days of grace; and they are not presentable for acceptance, but only for payment.[1] Cheques on bankers are intended for immediate payment; but a party taking a cheque after any fixed time from its date, does not do so at his peril—cheques being practically regarded as continuing securities, unless under circumstances which ought to have excited the suspicion of prudent men. A cheque cannot, therefore, be treated as overdue, until it has been presented for payment and payment refused.[2] If the drawer of a cheque, payable instantly, have no funds in the bank at the time, the holder can sustain an action upon it; not, however, till after notice of presentment and non-payment.[3]

330. When payment is made by cheque, it is the duty of the person receiving it to use the utmost diligence in getting it paid, as otherwise it would be at his peril. Payment by

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[1] In the matter of Brown, 2 Story, 502.

[2] Rothschild *v.* Corney, 9 B. & C. 388. Barough *v.* White, 4 B. & C. 325. Brooks *v.* Mitcham, 9 M. & W. 15.

[3] Harker *v.* Anderson, 21 Wind. 372.

cheque is not as cash; therefore the debt will remain liable on it, although the evidence of the debt was returned to him. But, nevertheless, to preserve this recourse against the drawer of the cheque, there must be no negligence in the presentation of it for payment. The receiver of a cheque has till the close of the banking house on the following day to present it, whether the presentment is made by himself or through his bankers. A debtor paid his creditor by a crossed cheque, and the creditor on the same day transmitted it to his banker. The banker omitted to present it at the clearing house in time for that day, when it would have been paid, and on the next it was dishonoured, the firm on which it was drawn having stopped payment. This negligence did not discharge the drawer, but rendered the banker liable to his customer.

331. A cheque on a banker, payable to bearer on demand, is not liable to stamp duties, provided that it be issued within fifteen miles of the place where the banker carries on his business; that the place of issuing be truly specified in it; that it be dated on or before the day on which it is issued, and not after; and that it do not direct the payment to be made by a bill or note. If the cheque is issued unstamped, at a greater distance than fifteen miles from the banker on whom it is drawn, it becomes illegal; and the person issuing it, and the banker knowingly paying it, incur the penalty of 100*l.* each; and the person knowingly receiving it in payment, or as a security, incurs a penalty of 20*l.*[1] A cheque is considered as issued at the place where the drawer parts with the possession of it, and if it be transmitted by him through the post, the place of issuing is that where it is posted. An unstamped cheque, issued within fifteen miles, cannot be nego-

[1] 16 & 17 Vict. c. 59. All drafts or orders payable to order on demand, other than cheques on bankers payable within the distance of fifteen miles, are subject to a stamp duty of 1*d.* A similar duty of 1*d.* has been imposed on all receipts for sums of 2*l.* and upwards. Such duties on receipts and drafts may be denoted either by a stamp impressed upon the paper whereon the instrument is written, or by an adhesive stamp affixed thereto.

tiated or circulated at any place beyond the same distance of fifteen miles from the place where the same is made payable; and it has been recently enacted, that such draft cannot be remitted to any place beyond the distance of fifteen miles in a direct line from the bank or place at which the same is made payable; or be received in payment, or as a security, or be otherwise negotiated or circulated, at any place beyond the same distance. And any person sending such draft beyond such distance, or receiving the same in payment, and circulating it, would forfeit the sum of 50*l*.[1] But the same draft may be rendered valid far beyond such distance of fifteen miles, by the holder affixing to it a proper adhesive stamp, and cancelling the same, by writing thereon his name, or the initial letters of his name.[2]

332. By a common practice, originally introduced at the clearing house,[3] cheques are crossed with the name or initial of a particular banker, upon which bankers generally refuse to pay it to any one except the banker. The object is to secure the payment, not to any particular banker, but to a banker, in order that it may be easily traced for whose use the money was received. It was not intended thereby to restrict the circulation or negotiability of the cheque, but merely to compel the holder to present it through a quarter of known respectability and credit. Consequently the crossing is a mere memorandum on the face of the cheque, and forms no part of the instrument itself, and in no way alters its effects. It is only a protection and safeguard to the owner of the cheque; so that the payment of a crossed cheque otherwise

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[1] 17 Vict. c. 83, § 7. [2] Ibid. § 11.

[3] The clearing house is a place used by bankers for facilitating their exchange on each other's houses. All cheques which have been paid in during the day on other bankers, are brought at half-past three o'clock to the clearing house, where the clerks exchange their cheques on each other, and settle the difference; so that the balances are easily struck from all the accounts, and the claims transferred from one to another. Stock-brokers settle all their receipts and payments by cheques, to be paid through the clearing house.

than through a banker, would be strong evidence of negligence on the part of the banker, if the party presenting the cheque proved not to be the lawful owner of it.[1] It would make no difference whether the cheque is crossed with the name of a specific banker, such as London and Westminster Bank, or Bank of England, for the account of the Accountant General, or ———— and Co.; in all such cases the meaning is, that the cheque shall be paid through a banker.

The duty of a banker to honour the cheques of his customers, when he has proper funds in the bank, has already been defined under the head of the relation between bankers and customers.

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[1] Bellamy *v.* Majoribanks, 7 Exch. 389.

POSTSCRIPT.

Whilst the foregoing sheets were passing through the press, a measure on the subject alluded to under the Chapter on Merchants, p. 42, has passed into law. By the 17th and 18th Vict. c. 34, the Courts of Law in England, Ireland, and Scotland, were enabled to issue process to compel the attendance of witnesses out of their jurisdiction, and to give effect to the service of such process in any part of the United Kingdom.

All laws relating to Usury have been abolished. As the law stood, no person could take more than five per cent. interest, for loan of any monies or other commodities; except, however, that Bills or Notes not having more than twelve months to run, and any contract for the loan or forbearance of money above the sum of 10*l.*, were not affected by the Usury Laws.

By the 17th and 18th Vict. c. 90, the Acts relating to Usury were repealed throughout the United Kingdom. These extended over about twenty Acts, and parts of Acts, of the Parliaments of England, Scotland, and Ireland, from the time of Henry VIII. to the present reign. The futility of prescribing a limit to the price which a person in want of a commodity is willing or compelled to give for it, has at last been recognised. Measures of this description neither protect the needy borrower from oppression, nor guard the greedy lender against the temptations of high premiums.

The Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125,) incorporated some clauses of the Arbitration Bill, referred to in p. 125. According to this statute, when reference has been made to two arbitrators, one to be chosen by each party, and one party fail to appoint, the other party may appoint the arbitrator to act alone. Every agreement or submission in writing may be made a rule of court, unless a contrary intention appears; and when the document authorizing the reference has been made a rule of any one of the superior courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award. There are also other clauses in the statute with reference to the power of the judge to leave matters to arbitration. This statute does not extend to Ireland or Scotland.

The introductory Chapter, on the Progress of Commerce, was illustrated by three Tables of the Exports of Produce and Manufactures of the United Kingdom of Great Britain and Ireland, the United States of America, and France, for 1852. The Table of the Exports of the United Kingdom for 1853 has since been published, and is herein appended. It will show an increase of about 21 millions over the exports of 1852, and that they are now double the amount of those of the United States, and France.

The distribution of the Exports divided, as to Foreign Countries and British Possessions, exhibits a considerable increase in the proportion sent to the latter. In 1853, the value of exports to Foreign Countries amounted to 65,551,579*l.*, and that of those to the British Colonies to 33,382,202*l.* Of these, the greatest items were 14,513,700*l.* to the British Settlement in Australia; 8,185,695*l.* to the British Territories in the East Indies; and 4,896,544*l.* to the British North American Colonies.

EXPORTS OF THE UNITED KINGDOM FOR 1853.

	COUNTRIES.	Proportional per centage exported to different countries.	Declared Value.
			£
1.	United States and California	23.9134	23,658,427
2.	British Settlements in Australia	14.6685	14,513,700
3.	British Territories in the East Indies	8.2739	8,185,695
4.	Hanseatic Towns	7.1707	7,093,314
5.	British North American Colonies	4.9513	4,898,544
6.	Netherlands	4.5009	4,452,955
7.	Brazil	3.3218	3,186,407
8.	France	2.6649	2,636,330
9.	Turkey	2.0511	2,029,305
10.	British West Indies	1.9271	1,906,639
11.	Spain Continental, Balearic and Canary Islands...	1.4831	1,468,357
12.	China	1.3884	1,373,689
13.	Belgium	1.3866	1,371,817
14.	Portugal Proper, Azores, and Madeira	1.3407	1,335,382
15.	Chili	1.2785	1,264,942
16.	Peru	1.2785	1,216,730
17.	Russia, Northern Ports, and Ports within the Black Sea	1.1389	1,124,864
18.	Cuba	1.2416	1,228,404
19.	Sardinian Territories	1.1224	1,112,447
20.	British Possessions in South Africa	1.2257	1,212,630
21.	Mexico	0.8001	791,940
22.	Egypt	0.7955	787,111
23.	Gibraltar	0.6780	670,840
24.	Duchy of Tuscany	0.6466	639,794
25.	Naples and Sicily	0.6463	639,544
26.	Austrian Territories	0.6447	637,353
27.	Western Coast of Africa not particularly designated	0.6244	617,764
28.	Prussia	0.5859	579,588
29.	Denmark	0.5758	569,733
30.	Java and Sumatra	0.5643	558,212
31.	Sweden and Norway	0.5569	556,183
32.	Buenos Ayres	0.5568	551,035
33.	Uruguay	0.5366	529,883
34.	Hanover	0 4772	472,179
35.	Channel Islands	0.4751	470,107
36.	New Granada	0.4555	450,804
37.	Philippine Islands	0.3906	386,552
38.	Mauritius	0.3900	385,879
39.	Hong Kong	0.3799	375,908
40.	Syria and Palestine	0.3098	306,580
41.	Malta	0.3011	297,906
42.	Venezuela	0.2508	248,190
43.	Papal Territory	0.2097	207,491
44.	Wallachia and Moldavia	0.1875	179,510
45.	Kingdom of Greece	0.1367	135,315
46.	Hayti	0.1352	133,804
47.	Ionian Islands	0.1178	116,567
48.	Morocco	0.0760	75,257
49.	French Possessions, Senegambia	0.0017	1,725
50.	Other Countries	0.9224	912,662
51.	Other Possessions	0.3515	347,787
			98,933,781

ERRATA.

Page 14, line 12, *instead of* 32 per cent., *read* 75 per cent.
— 15, remarks on table, line 4, *instead of* between the same dates, *read* between 1842 and 1852.
— 53, note, *instead of* Report of the Prizes, *read* Report of the Juries.
— 85, note 6, *read* Wolfe *v.* Oxholm, 6 M. & S. 92.
— 127, note 3, *instead of* Nasusch, *read* Natush.

INDEX.

A.

ACCEPTANCE FOR HONOUR, by whom, 249.
duties of the holder of a bill so accepted, 249.
ACCEPTANCE OF FOREIGN BILLS need not be in writing, 248.
what will amount to an acceptance, 248.
ACCEPTANCE OF INLAND BILLS must be in writing, 247.
law in Scotland, 247.
may be conditional, 248.
may be withdrawn before the bill is delivered, 248.
ACCEPTOR, liability of, 249.
ACCOUNTS, partnership, 127.
of Joint-Stock Companies, 182.
ACTS OF A PARTNER bind the firm, 141.
AGE OF MAJORITY. *See* MAJORITY.
ALIENS, FRIENDS, AND ENEMIES, 42.
friends, right of, to hold personal property, 42.
may become naturalized, 42.
rights of, in the United States, 43.
in France, 43.
in Sardinia, 43.
in Spain, 43.
in Portugal, 43.
in Austria, 43.
in Russia, 43.
in Sweden, 43.
in Two Sicilies, 43.
enemies, who are, 85.
disabilities of, 85, 118.
AMALPHITAN TABLE, when compiled, 28.
AMERICA, discovery of, 7.
See UNITED STATES.
AMERICAN COLONIES, Declaration of Independence, 10.
APPRENTICESHIP, statute of, 34.
ARBITRATION, effect of clause in partnership deed, 124.
in France, 125.
bill on the subject, 125.
ARBITRATION LAW, clauses of Common Law Procedure Act referring to, 263.
ATHENIANS, laws of, 27.

B.

BANK CHARTER, principles of, 202, 203.
BANK OF ENGLAND, how constituted, 200.
charter of, 202.
privileges of, 204.
capital of, 202.
BANK OF ENGLAND NOTE, a legal tender in England, 205.
BANK OF FRANCE, capital of, 206.
BANK OF IRELAND, constitution of, 206.
capital of, 206.
BANK OF IRELAND NOTE, legal tender in Ireland, 206.
BANK OF SCOTLAND, constitution of, 205.
capital of, 206.
BANK OF SCOTLAND NOTE, legal tender in Scotland, 206.
BANK NOTES, issue of, in England, 202.
in Scotland, 208.
in Ireland, 208.
BANKER, definition of, 212.
rights of, over property in his hands, 213.
lien over securities, 214.
duties of, to pay cheques of customers, 214.
bankruptcy of, its effects on securities in his hands, 214.
relation of, to customers, 212.
BANKING, history of, 199.
BANKING COMPANIES, formation of, 206.
power of, to issue notes, 207.
BANKING JOINT-STOCK COMPANIES, requisites of the Act regulating them, 210.
directors of, may make calls on shareholders, 211.
BANKING SYSTEMS in England, Ireland, and Scotland, differences of, 208.
BANKRUPT, minor cannot be, 44.
may in Scotland, 45.
married females cannot, 48.
may in the City of London, 48.
BANKRUPT PARTNER need not be joined in a suit against partnership, 152.
cannot be joined in a suit by partners, 160.
ceases to exercise control over partnership effects, 160.
from what time dissolution will take place in consequence of, 160.
BANKRUPTCY of a partner causes dissolution of partnership, 160.
of partnership, consequences of, 166.
in Scotland, 166, 167.
BANKRUPTCY COURT, jurisdiction of, 34.
on the winding up of Companies, 195.
BARBARIANS, descent of, into Italy, 3.

BELLIGERENTS, rights of, 83—87.
what goods may be confiscated, 86.
right of search, 88, 89.
right to capture enemy's property, 90.

BILLS OF EXCHANGE AND PROMISSORY NOTES, origin of, 4.
probable amount of, in circulation, 232.
definition of, 232.
form of, 234.
no precise word necessary to a bill, 234.
may be written with pencil, 234.
must be payable absolutely, 235.
name of payee must be certain, 236.
to be negotiable, must contain the words, "To order," 236.
negotiability of, may be restrained, 244.
may be transferred by endorsement or delivery, 243.
by whom may be accepted, 247.
cannot be altered without consent of the parties to it, 237.
must be stamped, 238.
any material alteration requires new stamp, 242.
when considered as issued, 242.
drawn in England on a person in Scotland or Ireland, and *vice versa*, 237.
foreign, drawn in a set, 237.
form of, 237.
who may be parties to a bill, 242.
the signature of one partner in a bill binds the firm, 140.
endorsement of, 243.
acceptance of, 247.
presentation of, for acceptance, 246.
for payment, 249.
protest of, when necessary, 253.
notice of dishonour of, 254.
payment of, 256.

BLANK ACCEPTANCE, effect of, against party signing it, 236.

BLOCKADE, definition of, 96.
when it exists, 96.
what is a notice of, 97.
when it ceases, 97.
object of, 97.
not suspended by accidental change, 96.

BOOK, definition of, 66.
copyright in, 66. (*See* COPYRIGHT.)

BREACH OF BLOCKADE, effect of, 96.

C.

CAPACITY OF PARTIES TO A CONTRACT, 104.

CAPITAL invested in railways, 12.

CAPTOR, duties of, with respect to captured property, 92, 95.
must not break bulk, 95.

CAPTURE, right of, 90.

CERTIFICATE OF PROPRIETORSHIP of shares in companies, value of, 184.

CHANCERY, COURT OF, origin of its jurisdiction, 145.
principles on which it is founded, 145.
nature of evidence admitted in, 146.
what remedy it administers in partnership disputes, 147.
may direct partnership accounts to be taken, 148.
will grant injunction in cases of partnership, 149.
may appoint a receiver in cases of gross abuse, 149.
may order sale of partnership effects, 128.
jurisdiction of, in winding-up of companies, 195.

CHARTERS OF INCORPORATION, duration of, 171.

CHEQUES ON BANKERS, definition of, 259.
crossing of, its effects, 261.
are continuing security, 259.
duty of bankers to pay those of their customers, 214, 262.
payable on demand, 259.
need not be stamped, 260.

CHINA TRADE, opening of, 12.

CHRISTMAS DAY, bills payable on, payable the day before, 51.

CLEARING HOUSE, object of, 261.

CLERGYMEN cannot trade, 118.

COASTS, what include, 21.

CODE OF COMMERCIAL LAW, importance of, 31.

CODIFICATION, extension of, in France, 30.

COLONIES, BRITISH, law of, 27.
as to minors, 44.
as to patents, 58.

COMMANDITAIRE PARTNER, right of, 216.
name of, not included in the firm of partnership, 218.
cannot take part in the business, 216.
may examine the accounts, 216.
liable only for the sum originally subscribed, 218.

COMMANDITE PARTNERSHIP. *See* PARTNERSHIP.

COMMERCE, definition of, 1.
progress of, 1—17.
of the Grecians, 2.
of the Romans, 2.
of the Italians, 3.
of the Hanse Towns, 5, 8.
with India, 6.
with America, 7.
effects of the Edict of Nantes, 9.
progress of navigation, 10.
effects of gold discoveries, 14.
of the United Kingdom, 15.
of the United States, 16.
of France, 17.

COMMERCE, RESTRAINTS OF. *See* TRADE.

COMMERCIAL INTERNATIONAL LAW, 18—22.

COMMERCIAL LAW, nature, spirit, and history of, 23—31.
nature of, 23.
elements of, 24.
history of, 27.
of the Greeks, 27.
of the Romans, 27.
of England, progress of, 29.

COMMERCIAL SYSTEM, fallacy of, 19.

COMMERCIAL TRIBUNAL, value of, 150.

COMMUNITY OF INTEREST is not partnership, 111.

COMPANIES BY CHARTER, formation of, 169.
liability of members thereof, 171.
may sue and be sued in the names of their officers, 170.
liability of members thereof may be limited, 171.
formed by deed, 170.
may sue shareholders for payment of instalments, 184.
for public works, how constituted, 186.
how to effect mortgages, 187.
contracts of, 184. (*See* JOINT-STOCK COMPANY.)

COMPASS, invention of, 5.

COMPLETE REGISTRATION of companies, how obtained, 190.
effects of, 181.

CONGRESS, statistical resolution of, for assimilation of mercantile law, 32.

CONSENT, when not valid, 101.
when, by correspondence, 102.

CONSIDERATION necessary for a promise, 104.
difference between good and valuable, 105.

CONSOLATO DEL MARE, nature of, 28.
when and where published, 28.

CONSUL, national character of, 39.

CONTRABAND OF WAR, which articles are, 98.
when provisions may become so, 99.
no freight due on it, 99.
may be seized, 100.

CONTRACT, validity of, 40.
by what law it is governed, 40.
by correspondence, when concluded, 340.
with the enemy void, 86.
nature of, 101.
essentials of, 101.
what may be the subject matter of, 104.
form of, 105.
must be in writing, 105.
construction of, 106.

CONTRIBUTORIES of companies, who are so held, 197.
liabilities of, 197.
list of, how formed, 197.
CONVOY SHIPS do not protect from search, 89.
COPYRIGHT, nature of, 64.
is regulated by statute law, 70.
history of, 65.
in France, 65.
in the United States, 65.
in Prussia, 65.
in Denmark, 65.
in Sweden, 65.
in Norway, 65.
in Spain, 65.
in Austria, 65.
in Holland, 65.
infringement of, liable to action, 73.
what is infringement of, 73, 74.
test of piracy, 76.
COPYRIGHT IN BOOKS, duration of, 66.
copies of books must be delivered to public libraries, 67.
to be registered at Stationers' Hall, 68.
assignment of, must be registered, 69.
a foreigner has none, when the book was written abroad, 71.
COPYRIGHT IN WORKS OF ART AND MANUFACTURES, nature of, 71.
duration of, 72.
COPYRIGHT, INTERNATIONAL, statute regulating it, 76.
requisites of works to be so entered, 79.
treaty with Prussia, 80.
„ with Saxony, 80.
„ with Brunswick, 80.
„ with Thuringian Union, 80.
„ with Hanover, 80.
„ with Oldenburg, 80.
„ with the Ranaults, 80.
„ with France, 80.
CORN-LAWS, repeal of, 13.
COST-BOOK PRINCIPLE, definition of, 189.
contents of cost-book, 190.
rights of purser, 190.
rights of adventurers, 190—192.
CROSSING OF CHEQUES, effect of, 261.
CREDITORS, lien of, in partnership property, 166.
CUSTOM DUTIES, effects of, 19.
CUSTOMS of merchants, authority of, 24.
cannot be set against Acts of Parliament, 25.

D.

DAYS OF GRACE, how computed, 250.
in foreign countries, 250.

DEATH OF PARTNER causes dissolution of partnership, 161.
effects of, on surviving partners, 161.
on the property of deceased partners, 161.

DECLARATION OF WAR, when issued, 83.
not necessary on both sides, 84.
effects of, 84.

DEED OF PARTNERSHIP, nature of, 123.
of chartered companies, contents of, 170.
of settlement necessary for obtaining complete registration, 181.
must be stamped, 106.

DEEDS, requisites of, 105.

DIRECTORS OF COMPANIES, rights of, to make contracts, 184.
to sign bills of exchange, 164.

DISCOVERY, BILL OF, when granted by Court of Chancery, 166.

DISSOLUTION OF PARTNERSHIP, modes of, 159.
by the will of the parties, 159.
by the loss of the object in partnership, 159.
by lapse of time, 157.
by marriage of a single woman, 160.
by public war, 162.
by death of partner, 161.
by insanity of partner, 160.
by insolvency or bankruptcy of partner, 160.
is governed by partnership articles, 155
effects of, as among the partners, 160.
right of partners to partnership property, 163.
effects of, with respect to creditors, 165.
how notified, 153.
partial, by retirement, 153. (*See* RETIRING PARTNER)

DIVIDENDS by companies for public works, how made, 188.

DOMICILE of birth, 37.
of choice, 37.

DORMANT PARTNERS, who are, 122.
liability of, 116, 122.
need not give notice of retirement, 153.
liable for prior contracts, 153.
must give notice of retirement in Scotland, 154.
when their responsibility ceases, 154.
need not join in a suit, 154.

E.

EAST INDIA, extent of possessions in, 8.

EAST INDIA COMPANY, formation of, 8.

ECCLESIASTICS prohibited from trading, 36.

EMANCIPATION OF MINORS, at what age, 47.
effects of, 47.

EMBARGO, effects of, 84.

EMPLOYER AND EMPLOYED, relations of, 114.

ENDORSEMENT OF BILLS AND NOTES, origin of, 243.
no particular form necessary, 243.
may be in any part of the bill, 243.
may be general or special, 243.
is of the nature of a new bill, 244.
may be made before or after maturity, 245.
admits all antecedent endorsements, 245.
who has right to transfer, 246.
ENDORSER is liable as a new drawer, 244.
who may endorse, 246.
ENGLAND, IRELAND, AND SCOTLAND, LAW OF, differences between, as to municipal law, 26.
minors, 45.
married women, 48.
contracts on the Sabbath, 50.
Good Friday and Christmas Day, 51.
statute of limitations, 107.
acknowledgment, 108.
partnership, 129.
division of profits between partners, 132.
rights of partners, 142.
actions between companies, 150.
remedies of partnerships, 151.
dormant partners, 154.
bankruptcy of partners, 160.
ranking of debts, 167.
Joint-Stock Companies Act, 176.
Winding-up Acts, 198.
bank notes, 206.
banking systems, 208, 209.
Joint-Stock Bank Act, 212.
EQUITY. *See* CHANCERY.
difference between law and equity, 146.
EVIDENCE of parties, when admitted, 146.
EXPORTS of British produce to the Free Towns, 8.
produce and manufactures of the United Kingdom, table of, 15.
of the United States of America, table of, 16.
of France, table of, 17.
EXPORTS OF GOLD from America to Europe, 7.
EXPULSION OF PARTNERS, provisions for, in deed of partnership, 128.

F.

FIRM, held to be a separate or moral person, 128.
liability of partners included in it, 121.
effect of the words "& Co." in the United States, 122.
FISHING, right of, 21.
FOREIGN BILLS, drawn in set, 241.
must be protested, in case of non-payment or non-acceptance, 254.
must be stamped, 240.
may be accepted without writing on the bill, 248.

FOREIGN CONTRACTS, form and effects of, 39.
by what law they are governed, 39.
with respect to personal disabilities, 41.
FOREIGN JUDGMENTS, value of, 41.
FRANCE, exports of, to various countries, 17.
FREIGHT cannot be claimed for goods contraband of war, 99.

G.

GERMAN UNION OF CUSTOM, formation of, 1.
GOLD imported from America into Europe, 7.
coinage of, in six years, 14.
effects of gold discovery, 13.
GOOD FRIDAY, bills of exchange falling due on that day, 51.
not held in Scotland, 51.
GOODWILL of a trade treated as partnership property, 131.
GRAIN, quantity of, imported into the United Kingdom, 14.
GREAT BRITAIN, discovery of, 2.
GREECE, commerce of, 2.
GUARANTEE by a partner on partnership affairs binds the partnership, 141.
GUILDS, admission into, in Russia, 36.

H.

HANSE MERCHANTS, privileges of, 6.
HANSE TOWNS, amount of exports to, from United Kingdom, 15.
commerce of, 8.
league, origin of, 6.
HOLDER OF BILLS, duties of, with respect to stamp-duties, 240.
to present bills for acceptance, 246.
for payment, 246.
to protest bills, 253.
to give notice of dishonour, 254.
cannot give the acceptor time for payment, 257.
may have recourse to any party in the bill, 257.
duties of, with respect to cheques, 259.
HOLIDAYS, bills becoming due on, 51.
respected by the law-merchant, 251.

I.

IDIOTS cannot be partners, 118.
INCOMING PARTNER not liable for prior contracts and debts, 144.
when liable, 144.
INDIA, discovery of, 6.

INFANT PARTNER, not necessary to be joined in the suit, 151.
cannot endorse bills, 246.
cannot convey interest by endorsement on bills, 246.
INJUNCTION, when granted by the Court of Chancery, 149. (*See* PARTNERSHIPS.)
INSANITY OF PARTNER a ground of dissolution of partnership, 160.
INSURANCE COMPANIES, how constituted, 193, 194.
liability of members, 194.
INTERNATIONAL CODE of commercial law, want of, 31.
INTERNATIONAL COMMERCIAL LAW, 18—22.
INTERNATIONAL COPYRIGHT. (*See* COPYRIGHT.)
INTERNATIONAL LAW, nature of, 81.
rise of, 83.
writers on, 83.
ITALY, rise of commerce of, 3.
origin of banking in, 198.

J.

JEWS, proscription of, 4.
JOINT-STOCK, when it remains the separate property of partners, 114.
JOINT-STOCK COMPANIES, progress of, 171.
table of those provisionally and completely registered, 181.
provisions of Joint-Stock Companies Act, 176—186.
power of members, when completely registered, 181.
nature and origin of, 168.
causes of the Bubble Act, 169.
JOINT-STOCK BANKING COMPANIES ACT, requisites of, 209.
JOINT-STOCK COMPANIES ACT, to what business it applies, 176.
duties of proposers of joint-stock companies, 176.
JUDGMENTS, FOREIGN, value of, 41.

L.

LABRADOR, discovery of, 7.
LIABILITY of minors for their acts, 44.
in Scotland, 45
of married women for their acts, 48.
in Scotland, 48.
of nominal partner, 120.
of voluntary partner, 120.
of dormant partners, 122.
of incoming partner, 144.
of retiring partners, 153.
of members of partnership, 134.
of partners *en commandite*, 216.
LICENCES are high acts of sovereignty, 87.
construction of, 87.
for enumerated articles, 87.

LICENCES (*continued*)—
effect of deviation from them, 88.
never operate retroactively, 88.
effects of fraud in the using of, 88.
LIMITATION OF ACTION, periods of, 107.
in Scotland, 108.

M.

MAJORITY, AGE OF, in the United Kingdom, 44.
in France, 44.
in Sardinia, 44.
in Bavaria, 44.
in Russia, 44.
in Saxony, 44.
in Denmark, 44.
in Spain, 44.
in Portugal, 44.
in Holland, 44.
in Prussia, 44.
MAJORITY rule minority in partnership disputes, 127.
MANSFIELD, LORD, his influence on commercial law, 29.
MARINERS, national character of, 39.
MARITIME CAPTURE, right of, 90. (*See* CAPTURE.)
MARRIED FEMALES, status of, 47.
cannot trade, 48.
may in the city of London, 48.
in Scotland, 48.
authority of, in the United States of America, 47.
in France, 48.
bills payable to, by whom endorsed, 246.
cannot form partnership, 117.
may, in the city of London, 117.
may be partners even with their husbands, in France, 117.
MERCHANT, definition of, 34.
who may be, 34.
national character of, 39.
MERCHANT LAW, what, 24.
MERCHANT VESSELS subject to search, 89.
effect of resistance from search, 89.
papers to be carried on board, in time of war, 89.
MINING COMPANIES, how formed, 189.
on the cost-book principle, 189.
MINORITY, by what law governed, 41. *See* MAJORITY.
MINORS, who are, 44.
what they may do, 44.
their disabilities, 44.
validity of contracts of, 44.
may bind themselves apprentices, 45.
authority of, in Scotland, 45.

MINORS (*continued*)—
authority of, in France, 47.
emancipation of, 47.
duty of, on attaining majority, 45.
may be partners, 116.
but not liable to losses, 117.
MORTGAGES, how affected by companies, 187.
register of, to be kept, 187.

N.

NANTES, revocation of edict of, 9.
NAPOLEON, codes of, 10.
NATIONAL CHARACTER of the merchant, 37.
how acquired, 38.
of the consul, 39.
of a ship, 39.
of master and mariner, 39.
NATIONS, LAW OF, nature of, 83.
province of, 18.
NATIONS, right of, to permit or prohibit trade, 18.
NAVIGATION LAWS, enactment of, 8.
repeal of, 13.
NEUTRALITY, definition of, 98.
how it may be infringed, 99, 100.
NEUTRAL PROPERTY on board enemies' ships, whether confiscable, 91.
treaties on the subject, 91—94.
NEUTRAL SHIP is neutral territory, 95.
cannot enter a blockaded port, 98.
duties of, when in a blockaded port, 98.
NEUTRAL TERRITORY, inviolability of, 93.
NEUTRALS, right of, to carry enemy's property, 92.
colonial trade prohibited to, 98.
rule of 1756, 98.
coasting trade prohibited to, 98.
cannot carry contraband of war, 98.
Order in Council respecting, 100.
NOBLES prohibited from trading, 36.
NOMINAL PARTNERS, who are, 119.
liability of, 120.
NOTICE OF DISHONOUR of Bills and Notes, form of, 255.
when to be sent, 254.
law in Scotland, 254.
by whom to be sent, 255.
may be given verbally, 255.
what will excuse notice, 256.
NOTICE OF DISSOLUTION OF PARTNERSHIP, how given, 153.
effects of, 153.

O.

OLD AND NEW STYLES, account of, 251.
ORDER IN COUNCIL, nature of, 86.
permitting neutral trade, 100.
on copyright, 76, 80.
ORDINANCE DE LA MARINE ET DE COMMERCE of France, 9.
ORDINANCE OF FOREIGN STATES, authority of, 25.
OSTENSIBLE PARTNERS, who are, 119.

P.

PAROLE EVIDENCE, when admissible in written contracts, 106.
PARTICIPATION IN PROFITS AND LOSSES, when constitutes partnership, 112.
PARTNERS, who may be, 116.
infant, 116.
married females may not be, 117.
alien enemy, 118.
nominal, who are, 119.
ostensible, who are, 119.
dormant, who are, 122.
liability of, 116 (note).
voluntary, 120.
authority of, 139.
have special lien on partnership property, 168.
may alter terms of partnership, 123.
may bind the firm by bills, 140.
by a guarantee, 141.
cannot bind the firm by submission to arbitration, 142.
nor by deed, 142.
may, in Scotland, 142.
may bind the firm by their representations, 142.
authority of, may be restricted, 143.
when it commences, 143.
interest of, in partnership property, 131.
in the profits and losses, 131.
in the same in Spain, 132.
in Portugal, 132.
in Austria, 132.
in Scotland, 132.
duties of, 133.
incoming, not liable for prior debts, 144.
responsibility of, 133.
for gross negligence, 133.
for wrongs, 133.
liability of unlimited, 134.
effect of community of profits, 114.
as agents, 141.
as members of companies, 177.

PARTNERS (*continued*)—
insanity of, effect of, 160.
bankruptcy of, effects of, 160.
remedies between them at common law, 144.
may maintain an action against copartners for money lent, 147.
upon bills, 147.
for a specific agreement, 147.
on a special transaction, 147.
for non-payment of instalment, 147.
when balance of account has been struck, 147.
cannot maintain an action on general account, 147.
not for work and labour performed for partnership, 147.
remedies of, at equity, 148.
for wilful breach of articles, 148.
for raising money for private use, 148.
by injunction, 149.
by the appointment of a receiver, 149.
right of, against third persons, 150.
all must join in the suit, 151.
infant, need not be a party to the suit, 151.
bankrupt, not necessary to be joined, 151.
retiring, liability of, when determined, 116.

PARTNERSHIP, origin of, 109.
definition of, 109.
essential ingredients of, 110.
formed by consent, 110.
what constitutes, 111.
as between the parties, 111.
as toward third persons, 112.
and agency, difference of, 113.
where there is participation of profits, 112.
in shipping contracts, 113.
in mining contracts in Cornwall, 113.
formation of the contract, 122.
deed, contents of, 123.
kinds of, 118.
in the United States of America, 119.
in France, 119.
in Holland, Belgium, and Spain, 119.
and joint tenancy, difference between, 130.
held to be a personal, or a moral person, 128.
how held at law, 129.
in Scotland, 129.
articles, 127.
when take effect, 126.
when deemed as altered, 123.
regarding winding up and dissolution, 127.
expulsion of partners, 128.
disputes ruled by majority, 127.
property of, what it consists in, 130.
all partners have common interest in, 130.
may remain the private property of one partner, 130.
real and personal, treated alike, 131.

PARTNERSHIP (*continued*)—
may sue in the name of the firm, in Scotland, 151.
effect of execution on the private property of one partner, 152.
may be partly dissolved by retirement of partner, 153.
dissolution of, 155.
effects of, on continuing business, 155.
dissolution of, at will, 156.
notice of, how given, 157.
by tacit renunciation, 158.
by extinction of the business, 159.
by insanity of partners, 160.
by other diseases, 160.
by marriage of a single woman, 160.
by insolvency or bankruptcy of partner, 160.
See DISSOLUTION, PARTNERS, PARTNERSHIP EN COMMANDITE.

PARTNERSHIP EN COMMANDITE, history of, 215.
constitution of the contract, 216.
how formed, in the United States and France, 217.
no part of original capital can be withdrawn, 217.
name of the firm, 218.
deed of, must be registered and advertised, 217.
dissolution of, how effected, 219.
extensively adopted on the Continent, 219.
uncertainty of the law in Great Britain, 220.
report of the Royal Commissioners, 221—223.
who are the contracting parties, 225.
difference between general and commandite partnership, 225.
loan and commandite, 225.
effects of, on retiring partners, 226.
inventors, how interested in, 226.
application of, to public companies, 227.
to banking companies, 229.
exception as to banks issuing notes, 230.
statistics of, 230.
province of Government with respect to, 231.

PATENT LAW, nature of, 52.
effects of, 53.
in the United States, 54.
in France, 54.
in Prussia, 54.
subject-matter of, 54.
requisites of, 56.
priority of invention necessary, 56.
who is entitled to it, 57.
how to obtain it, 57.
to what country it extends, 57.
in Nova Scotia, 58.
in New Brunswick, 58.
in Prince Edward's Island, 58.
in Newfoundland, 58.
in Jamaica, 58.
in Antigua, 58.

PATENT LAW (*continued*)—
in Barbadoes, 58.
in Victoria, 58.
in Van Diemen's Land, 58.
in San Christopher, 58.
in Trinidad, 58.
in New South Wales, 58.
in East India, 58.
cost of a patent in the United Kingdom, 62.
in the United States, 63.
in France, 63.
in Spain, 63.
in Austria, 63.
in Belgium, 63.
in Russia, 63.
in the Netherlands, 63.
for importation of foreign inventions, 59.
title and specification of, 59.
disclaimer of, 60.
property in, 61.
assignment of, 61.
remedies against infringement of, 62.
stamp-duties on, 62, 63.

PAYMENT OF BILLS, by whom must be made, 256.
in what money, 256.
may be enforced by common action, 257.
in Scotland, by decree of registration, 257.
of cheques, when made, 259.

PREEMPTION, right of, 99.

PRESENTMENT OF BILLS for acceptance, where necessary, 246.
evidence of, 247.
law in Scotland, 247.
for payment, when made, 250.
when and where to be made, 252.
what will excuse it, 253.

PROMISSORY NOTES, definition of, 233.
form of, 233.
See BILLS OF EXCHANGE.

PROTECTIVE DUTIES, policy of, 19.

PROTEST OF BILLS, when necessary, 253.
effects of neglect of, 254.
nature of, 254.
by whom made, 254.
not necessary for inland bills in England, 254.
always necessary in Scotland, 254.

PROVISIONAL COMMITTEE MEN, liability of, 179.
must render account to their subscribers, 180.
may sue for contributions, 180.

PURSER of a mining company, duties of, 190.

R.

RAILWAY SYSTEM, introduction of, 11.
progress of, 12.
capital employed in, 12.

RANK AND PROFESSIONS incompatible with trading, 36.

RECEIVER, when appointed by Court of Chancery, 149, 150.

REGISTRATION of joint-stock company, to whom does it belong, 176.
effect of provisional registration, 177.
power of committee, 177.
of partnership in France, 127.

RELEASE of one partner binds the firm, 142.

REMEDIES between partners, 144—150.
at law, 147.
at equity, 148.
when barred by statute of limitation, 150.
at equity, 150.
of partners against third persons, 150—152.

REPRESENTATION of one partner binds the firm, 122.

RESTRAINTS of trade, 33.
general or partial, 35.
by obligation not to trade, 35.

RESTRICTION OF LIABILITY of partners valid, if notified to third parties, 143.

RETIREMENT FROM PARTNERSHIP, when notification necessary, 153.
what debts are affected by, 153.

RETIRING PARTNERS, duties of, in retiring, 153.
remain responsible for balance of account, 155.
old and new accounts, 155.
leaving a sum at interest or annuity, 155.
for participation of profits, 155.
publication of retirement necessary, 153.
effect of a want of a notice of retirement, 153.

RETURNS to be made by chartered companies, 170.

RIVER, navigation of, 21.

ROMANS, their aversion to commerce, 2.
laws of, 27.

ROLES D'OLERON, provisions of, 5.

S.

SABBATH, statute for observance of, 49.
contracts made on, 50.
in France, 50.
in Scotland, 50.

SCOTLAND, union of, with England, 9.
law of, difference with the law of England and Ireland. (*See* ENGLAND.)

SEA, common property of, 2.
sovereignty of, 22.

SHARES IN JOINT-STOCK COMPANY, transfer of, 184.

SHIP, national character of, 39.

SOLDIERS prohibited from trading, 36.

SOUND DUES, tariff of, 22.

SPECIFICATION OF A PATENT, requisites of, 59.
when to be filed, 60.

STAMP DUTIES on patents, 62, 63.
on bills and notes, 239.
on foreign bills, 241.
duties of holders respecting, 240.
penalty for infringement of, 240.
in foreign countries, 242.
on cheques, 260.
on drafts on demand, 260.
on receipts, 260.

STATIONERS' COMPANY, when formed, 64.

STATUTE OF LIMITATION, as to bills, 258.
as to contracts, 107.

STATUTES, number of, 26.
defects of, 26.
27 Ed. 6, c. 17, p. 85.
5 Eliz. c. 4, p. 34.
21 Jac. 1, c. 3, p. 54.
21 Jac. 1, c. 16, p. 107.
29 Car. 2, c. 3, p. 105.
29 Car. 2, c. 7, p. 50.
1 W. & M. c. 20, p. 201.
3 & 4 Anne, c. 9, p. 233.
8 Anne, c. 19, p. 64.
6 Geo. 1, c. 18, pp. 169, 193.
8 Geo. 1, c. 14, p. 213.
8 Geo. 2, c. 13, p. 71.
9 Geo. 2, c. 5, p. 21.
7 Geo. 3, c. 38, p. 71.
17 Geo. 3, c. 57, p. 71.
21 Geo. 3, c. 49, p. 50.
21 & 22 Geo. 3, c. 16, p. 206.
54 Geo. 3, c. 56, p. 72.
38 Geo. 3, c. 71, p. 72.
48 Geo. 3, c. 88, p. 234.
54 Geo. 3, c. 96, p. 35.
54 Geo. 3, c. 156, p. 65.
55 Geo. 3, c. 134, p. 205.
55 Geo. 3, c. 184, p. 235.
1 & 2 Geo. 4, c. 77, p. 252.
1 & 2 Geo. 4, c. 78, p. 247.

STATUTES (*continued*)—
6 Geo. 4, c. 91, p. 169.
7 Geo. 4, c. 6, p. 234.
7 & 8 Geo. 4, c. 15, p. 51.
8 & 9 Geo. 4, c. 24, p. 247.
9 Geo. 4, c. 14, p. 46.
9 Geo. 4, c. 23, pp. 204, 207.
9 Geo. 4, c. 24, p. 51.
17 Geo. 4, c. 30, p. 234.
3 & 4 Will. 4, c. 15, p. 72.
3 & 4 Will. 4, c. 42, p. 152.
3 & 4 Will. 4, c. 98, p. 204.
5 & 6 Will. 4, c. 65, p. 72.
5 & 6 Will. 4, c. 83, pp. 60, 62.
6 & 7 Will. 4, c. 59, p. 71.
1 Vict. c. 73, p. 169.
1 & 2 Vict. c. 106, p. 37.
5 & 6 Vict. c. 45, p. 65—70.
5 & 6 Vict. c. 100, p. 72.
6 Vict. c. 65, p. 71.
6 & 7 Vict. c. 65, p. 72.
6 & 7 Vict. c. 68, p. 72.
7 & 8 Vict. c. 12, p. 77.
7 & 8 Vict. c. 32, p. 207.
7 & 8 Vict. c. 66, p. 42.
7 & 8 Vict. c. 69, p. 55.
7 & 8 Vict. c. 110, p. 176.
7 & 8 Vict. c. 113, p. 210.
8 Vict. c. 16, p. 188.
8 & 9 Vict. c. 38, p. 208.
8 & 9 Vict. c. 98, p. 198.
9 & 10 Vict. c. 75, p. 212.
10 & 11 Vict. c. 78, p. 177.
11 & 12 Vict. c. 45, p. 195.
12 & 13 Vict. c. 45, p. 198.
12 & 13 Vict. c. 106, p. 34.
12 & 13 Vict. c. 108, p. 195.
12 & 13 Vict. c. 109, p. 61.
14 & 15 Vict. c. 99, pp. 62, 146.
15 & 16 Vict. c. 12, pp. 78, 79.
15 & 16 Vict. c. 83, pp. 53, 57.
16 Vict. c. 83, p. 62.
16 & 17 Vict. c. 59, p. 260.
16 & 17 Vict. c. 107, p. 20.
16 & 17 Vict. c. 115, p. 60.
17 Vict. c. 5, p. 13.
17 Vict. c. 83, pp. 241, 269.
17 & 18 Vict. c. 90, p. 263.

STEAM-ENGINE, application of, to navigation, 10, 11.
STOCK-TAKING, on dissolution of partnership, 164.
STOLEN BILLS, property of, 244.
SUMMARY DILIGENCE in Scotland, 258.

T.

TERRITORY of a nation, extension of, 21.

TRADE, restraints of, 33.
by obligations not to trade, 35.
by regulations and privileges, 49.
by patent law, 52.
by the law of copyright, 64.
in time of war, 81.

TRADING WITH ENEMIES, as affected by order in Council, 86.

TRANSFER OF SHARES in a chartered company, how effected, 171.
in joint-stock banking companies, how proved, 211.

TREATIES OF COMMERCE, when introduced, 9.
objects of, 18.
as to free ship free goods, 91—95.

U.

UNITED KINGDOM, table of exports, 15, 265.

UNITED STATES OF AMERICA, formation of, 10.
population of, 10.
table of exports, 16.

USANCES between London and foreign countries, 252.

USURY, repeal of Laws of, 263.

V.

VOLUNTARY PARTNERS, who are, 120.
liability of, 120.

W.

WAR, causes of, 81.
declaration of, 83.

WAREHOUSING SYSTEM of United Kingdom, 20.

WINDING UP OF JOINT-STOCK COMPANIES ACTS, 195.
when, may be petitioned for, 195.
when the court will interfere, 195.
to what association do they apply, 196.
where the order may be obtained, 196.
do not apply to Scotland, 198.

WITNESSES, Act to compel the attendance of, 263.

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